IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
COREY M. SWISCHER,	)	**Supreme Court #SC92336**
	)	
Respondent.	)	

INFORMANT'S BRIEF

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ATTORNEYS FOR INFORMANT

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This action is one in which Informant, the Chief Disciplinary Counsel, is seeking to discipline an attorney licensed in the State of Missouri for violations of the Missouri Rules of Professional Conduct. Jurisdiction over attorney discipline matters is established by the Missouri Supreme Court's inherent authority to regulate the practice of law, Supreme Court Rule 5, this Court's common law, and Section 484.040, RSMo 2000.

STATEMENT OF FACTS

Background and Disciplinary History

Respondent, Corey M. Swischer ("Respondent"), born February 11, 1977, was licensed to practice law in Missouri on September 18, 2002. The address Respondent designated in his most recent registration with The Missouri Bar is 110 W. Ohio P.O. Box 367, Butler, MO 64730. Respondent has no disciplinary history.

Conduct Underlying the Information

Larry Mackey

Count I of the Information

On or about December 20, 2007, Complainant, Larry Mackey, entered into a contract with Timothy Bruce for the purchase of a John Deere baler. **App. 39; 56 (Tr. 31)**. Unbeknownst to Mr. Mackey, there was a lien against Timothy Bruce on the baler at the time that it was purchased by Mr. Mackey. **App. 56 (Tr. 31); 63 (Tr. 60)**. On or about August 8, 2008, John Deere Credit sent a letter to Mr. Mackey giving him notice that the baler was subject to a perfected security interest held by John Deere Credit. **App. 39**. The baler was thereafter repossessed and sold by John Deere Credit. **App. 39; 56 (Tr. 31); 63 (Tr. 60)**. Mr. Mackey's losses included the $11,700 purchase price of the baler, the inability to use the baler for farming, and the rental of a baler after the repossession. **App. 63 (Tr. 61)**.

On or about October 10, 2008, Mr. Mackey filed a civil suit in the Circuit Court of Vernon County, Missouri against the seller of the baler, Timothy Bruce. **App. 39; 56 (Tr. 31)**. Respondent represented Mr. Mackey in the civil action. **App. 39; 56 (Tr. 31);**

98 (Tr. 198-199). Respondent obtained a default judgment against Timothy Bruce and actual and punitive damages were awarded to Mr. Mackey in the amount of $42,480.00 plus $1,100.00 in attorney's fees. **App. 39; 56 (Tr. 32); 64 (Tr. 62); 98 (Tr. 199)**. On or about May 26, 2009, Timothy Bruce filed a Chapter 13 Voluntary Petition in the United States Bankruptcy Court, Western District of Missouri. **App. 39; 56 (Tr. 32); 203**. Mr. Mackey hired Respondent to represent him as a creditor in Timothy Bruce's bankruptcy proceeding. **App. 39; 56 (Tr. 32); 98 (Tr. 199)**. Recovering the money for the baler was important to Mr. Mackey because Mr. Mackey earns a living from farming and did not otherwise have the money for a baler. **App. 56 (Tr. 32)**. Mr. Mackey sought to have his civil judgment excluded from Mr. Bruce's bankruptcy as the judgment originated from the fraud of Mr. Bruce. **App. 56 (Tr. 32-33)**.

In Respondent and Mr. Mackey's employment agreement, Respondent agreed to attend the Meeting of Creditors, file a Proof of Claim, conduct a 2004 Examination and file an adversary complaint. **App. 39; 57 (Tr. 34-37); 58 (Tr. 38); 98 (Tr. 200)**. Respondent took fees from Mr. Mackey to attend the 2004 Examination and Meeting of Creditors of Timothy Bruce and it was Respondent's intention to use the statements garnered at the Meeting of Creditors and 2004 Examination to support an adversary complaint. **App. 99 (Tr. 202-203)**. The Bankruptcy Court mailed a Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors and Deadlines to Mr. Mackey. **App. 39; 185; 269-273**. The Meeting of Creditors Notice and Deadlines apprised creditors of the following deadlines:

1. The first Meeting of Creditors was scheduled for July 22, 2009;

2. The deadline to file a complaint to determine dischargeability of certain debts was 60 days after the first date set for the Meeting of Creditors;

3. Objections to confirmation were to be filed with the clerk within 20 days of conclusion of the first Meeting of Creditors;

4. Objections to exemptions were to be filed 30 days after the conclusion of the meeting of creditors; and

5. The deadline for all creditors to file a Proof of Claim was October 20, 2009.

App. 39; 269-270.

At a Meeting of Creditors, creditors are allowed to ask questions of the debtor. **App. 98 (Tr. 200)**. The first Meeting of Creditors convened on July 22, 2009. However, because the debtor, Timothy Bruce, did not appear for the Meeting of Creditors, it was continued to August 12, 2009. **App. 39; 57 (Tr. 34); 202**. On or about August 12, 2009, the bankruptcy court held the Meeting of Creditors in Timothy Bruce's proceeding. **App. 39; 202**. The debtor, Timothy Bruce, appeared at the Meeting of Creditors, but Respondent failed to attend on behalf of Larry Mackey. **App. 39; 57 (Tr. 34)**. At the time Larry Mackey hired Respondent, Mr. Mackey was certain that Respondent was going to attend the Meeting of Creditors. **App. 57 (Tr. 35)**. Respondent did not tell Mr. Mackey before the August 12, 2009 Meeting of Creditors that he would not be in attendance. **App. 57 (Tr. 35)**. Respondent did not tell Mr. Mackey after Respondent's failure to attend the August 12, 2009 Meeting of Creditors that Respondent had failed to

attend the Meeting of Creditors. **App. 57 (Tr. 35)**. Respondent contends that his failure to attend the meeting was due to incorrect calendaring of the event. **App. 165 (Tr. 23)**. Respondent further contends that attendance at the Meeting of Creditors was not necessary for Mr. Mackey to successfully pursue his goal of excepting Mr. Mackey's judgment by filing an adversary complaint. **App. 107 (Tr. 236)**.

The deadline to file an adversary complaint to determine the dischargeability of certain debts was September 20, 2009. **App. 39; 269-270**. A successful adversary complaint would exempt the creditor's judgment from discharge if the debtor's bankruptcy were to be discharged. **App. 98 (Tr. 201)**. In the case of Larry Mackey, if Mr. Mackey did not obtain an adversary judgment against Mr. Bruce, there was no other mechanism available in the Bankruptcy Court to continue collecting were Mr. Bruce's bankruptcy to be discharged. **App. 98 (Tr. 201)**. Respondent failed to file an adversary complaint on behalf of Mr. Mackey on or before September 20, 2009. **App. 39; 189-203**. Respondent did not immediately realize that he had missed the deadline for filing an adversary complaint. **App. 39; 100 (Tr. 206)**.

On or about October 13, 2009, Respondent filed a Motion for 2004 Examination on behalf of Mr. Mackey. **App. 39; 200; 295**. The purpose of the 2004 Examination is to conduct a private examination of the debtor. **App. 98 (Tr. 200)**. The debtor, Timothy Bruce, was to be examined October 28, 2009. **App. 39; 295**. Timothy Bruce did not appear for the October 28, 2009, 2004 Examination. **App. 39; 57 (Tr. 36)**. Respondent did not notify the bankruptcy court that Timothy Bruce failed to appear for the 2004 Examination and did not otherwise pursue the 2004 Examination of Timothy Bruce.

App. 39; 57 (Tr. 37). Sometime after October 14, 2009, Respondent realized that he had missed the deadline for filing Larry Mackey's adversary complaint. **App. 39; 100 (Tr. 206)**. Missing the adversary complaint deadline is a significant event in a bankruptcy case that is tantamount to missing a statute of limitations. **App. 101 (Tr. 210-211)**. Respondent did not inform Mr. Mackey that there was a deadline for filing the adversary complaint. **App. 58 (Tr. 38)**. Respondent did not write Mr. Mackey a letter informing Mr. Mackey that Respondent had missed the deadline for filing the adversary complaint nor did Respondent otherwise inform Mr. Mackey that Respondent had missed the deadline for filing the adversary complaint. **App. 58 (Tr. 38); 100 (Tr. 206)**. Mr. Mackey learned that Respondent had missed the deadline for filing the adversary complaint approximately two years after the missed deadline while participating in Respondent's disciplinary investigation. **App. 58 (Tr. 38)**. Respondent thereafter refused to speak with Larry Mackey. **App. 58 (Tr. 39)**.

On or about December 4, 2009, the Bankruptcy Court issued an Order Confirming the Chapter 13 Plan, as amended, of Timothy Bruce. **App. 39; 199; 308**. Thereafter, the Court issued its Notice Allowing Chapter 13 Claims as filed, or Disallowed as Not Filed. **App. 39; 199; 310-314**. Larry Mackey attempted to telephone Respondent often, but does not recall that Respondent ever returned even two telephone calls. **App. 58 (Tr. 40)**. Telephone call logs from Respondent's office from November 2009 to December 2009 indicate that a representative of Respondent's office took and recorded approximately 357 telephone messages left for Respondent by clients for the four week period. **App. 415-509**. Telephone call logs from Respondent's office from December

2009 to January 2010 indicate that a representative of Respondent's office took and recorded approximately 372 telephone messages left for Respondent by clients for the four week period. **App. 512-607**. At all times relevant herein, Respondent had access to his office's telephone logs. **App. 102 (Tr. 216-217)**. Telephone logs from Respondent's office for the period of December 2009 - January 2010 indicate that Larry Mackey left messages for Respondent on November 23, 2009, November 24, 2009, November 30, 2009, December 2, 2009, December 9, 2009, December 16, 2009, December 17, 2009, December 21, 2009, December 21, 2009 (again), December 23, 2009, December 28, 2009, (undated), January 6, 2010, January 8, 2010 and January 26, 2010. **App. 415-607; 612-616**.

Larry Mackey began tracking his case on the internet and felt that no progress was being made. **App. 58 (Tr. 38-39)**. On or about February 16, 2010, Larry Mackey filed an Objection to Notice Allowing Chapter 13 Claims as filed, or Disallowed as Not Filed in a handwritten letter to the Court. **App. 198; 322**. Three days later, the Bankruptcy Court overruled Larry Mackey's objection. **App. 198**. Mr. Mackey understood why his objection was overruled, but wanted his voice to be heard by the Court. **App. 58 (Tr. 39)**. On or about February 22, 2010, Mr. Mackey contacted the bankruptcy trustee by letter and informed the trustee that Mr. Mackey had attempted to contact his attorney, Respondent, but Respondent repeatedly failed to return Mr. Mackey's calls; that Respondent's secretary reported that she logged all of Mr. Mackey's calls and that she gave Respondent each message; that Respondent requested additional money for the 2004 Examination, travel, court reporter expenses, etc., but when the debtor did not

appear for the 2004 Examination, Respondent failed to pursue the issue; and that Mr. Mackey felt that there were numerous assets omitted from Timothy Bruce's filings and wanted to raise the issue with the Court, but now had no money to pay another attorney. **App. 323-324**. On or about March 12, 2010, Richard Fink, the bankruptcy trustee, responded to Mr. Mackey's letter by informing Mr. Mackey that he did not have jurisdiction in Mr. Mackey's dissatisfaction with Respondent, but that he would forward Mr. Mackey's letter to the Court regarding the alleged omitted assets. **App. 198; 322**. Thereafter, Larry Mackey wrote a letter to the Court requesting to file a motion to exclude Mr. Mackey's judgment from the bankruptcy case on the grounds that the Mr. Bruce engaged in fraud. **App. 349**. In the May 12, 2010 letter, Mr. Mackey informed the Court that Respondent was no longer acting as his attorney. **App. 349**. The Court treated Mr. Mackey's letter as an Adversary Complaint, Case 10-03011 against Timothy Bruce. **App. 196**. Mr. Mackey understood that he was now acting *pro se*, but he could not afford another attorney and felt that Respondent had unilaterally terminated the relationship. **App. 60 (Tr. 47-48)**.

On or about March 8, 2010, the Office of Chief Disciplinary Counsel ("OCDC") received a disciplinary complaint against Respondent from Mr. Mackey. **App. 39; 617-618**. Larry Mackey filed his complaint with the OCDC because he felt that he had paid for services that he did not receive and because he could not get Respondent to return his telephone calls. **App. 60 (Tr. 49)**. On or about April 14, 2010, the OCDC provided Respondent a copy of the complaint and requested that Respondent provide a written response no later than April 28, 2010. **App. 39; 791**. The OCDC did not receive

Respondent's response to the complaint on or before April 28, 2010. **App. 39**. Respondent contends that his secretary, Sherry Simpson, failed to give him the OCDC's letter dated April 14, 2010 and that Respondent did not discover the letter until April 27, 2010. **App. 143-144 (Tr. 381-382)**. On or about May 14, 2010, the OCDC contacted Respondent by letter and again requested that Respondent provide a written response to Mr. Mackey's complaint, this time no later than May 21, 2010. **App. 39; 792**. On or about May 21, 2010, Respondent provided a brief letter to the OCDC wherein Respondent did not respond to Larry Mackey's complaint, but instead contended that he had resolved matters satisfactorily with his client. **App. 39; 793**. On or about May 27, 2010, the OCDC contacted Respondent by letter and informed Respondent that the OCDC had jurisdiction to investigate the complaint and that the OCDC would require Respondent's written response to the complaint no later than June 7, 2010. **App. 39; 794**. The OCDC did not receive Respondent's written response to the complaint on or before June 7, 2010. **App. 39**.

At the beginning of July, 2010, Respondent contacted Mr. Mackey and scheduled a meeting at Respondent's office for July 9, 2010. **App. 61 (Tr. 50)**. Before Respondent contacted Mr. Mackey about the July 9, 2010 meeting, Mr. Mackey does not recall and does not believe that he spoke with or met with Respondent. **App. 66 (Tr. 72)**. When Mr. Mackey arrived at Respondent's office on July 9, 2010, Respondent gave Mr. Mackey three checks totaling $900.00 in refund of the trust deposit and attorney's fees paid to Respondent by Mr. Mackey. **App. 61 (Tr. 51); 105 (Tr. 226); 619**. Respondent believed that Larry Mackey had the potential to be harmed by what had happened in the

bankruptcy case and could have filed a legal malpractice case against Respondent. **App. 106 (Tr. 232)**. Therefore, Respondent determined to refund $900 in fees previously paid by Larry Mackey. **App. 104 (Tr. 225)**. Prior to the July 9, 2010 meeting, Mr. Mackey had never discussed with Respondent the possibility of settling a claim against Respondent. **App. 61 (Tr. 52)**. Respondent also drafted a settlement contract with Mr. Mackey wherein:

1. Respondent agreed to pay Mr. Mackey the single sum of $2,000.00;
2. Respondent agreed to pay Mr. Mackey $3,000.00 over the course of the next three years; and
3. In consideration for the money, Mr. Mackey agreed to release Respondent of any liability concerning Respondent's representation of Mr. Mackey in the Timothy Bruce bankruptcy case.

App. 39; 61 (Tr. 53); 105 (Tr. 226) 620-623. Respondent presented the settlement contract to Mr. Mackey for the first time on July 9, 2010. **App. 61 (Tr. 53)**. Included in the settlement contract that was drafted by Respondent was a provision reading:

> Larry W. Mackey covenants and agrees that it [sic] will not, at any time hereafter, either directly or indirectly, initiate, assign, maintain or prosecute, or in any way knowingly aid or assist in the initiation, maintenance or prosecution of any claim, demand or cause of action at law or otherwise, against the Released Parties, or any of them, for damages, loss or injury of any kind arising from, related to, or in any way connected to any activity with respect to which a release has been given

pursuant to Section 3 of this Agreement, including but not limited to any complaints made against Corey M. Swischer with the Missouri Bar.

App. 39; 620-623. Respondent used language from a settlement agreement that he already had on his computer and changed the names of the parties, as well as changing the language of the contract to add a release with respect to complaints made to "the Missouri Bar." **App. 105 (Tr. 227)**. At the time Respondent drafted the settlement contract, Respondent knew that Mr. Mackey had previously filed a complaint with the OCDC. **App. 105 (Tr. 227-228)**. The settlement contract also contained a confidentiality clause, providing that the terms of the agreement and the existence of the agreement, itself, should remain strictly confidential. **App. 39; 61 (Tr. 51-52); 622**. Mr. Mackey understood that as part of the settlement agreement, he would be required to withdraw his complaint from the OCDC. **App. 62 (Tr. 55-56); 63 (Tr. 58)**. Respondent and Larry Mackey signed the settlement contract on July 9, 2010. **App. 620-623**.

In addition, Respondent drafted a letter, dated July 9, 2010, directed to Dori DeCook, paralegal at the OCDC, with Larry Mackey's name in the signature block. **App. 62 (Tr. 57); 624**. The July 9, 2010 letter drafted by Respondent stated, "Dear Ms. DeCook: I wish to withdraw my complaint, File No. 10-530. Mr. Swischer and I have resolved all issues in my complaint and I am satisfied with his representation. Sincerely, Larry W. Mackey." **App. 62 (Tr. 57); 624**. The OCDC withdrawal letter was presented to Larry Mackey by Respondent for Larry Mackey's signature on July 9, 2010, the same date that Respondent presented the settlement contract to Mr. Mackey. **App. 62-63 (Tr. 57-58); 624**. Prior to arriving at Respondent's office on July 9, 2010, Larry Mackey had

never told Respondent that he wanted to withdraw his complaint from the OCDC. **App. 63 (Tr. 58)**.

On or about July 20, 2010, the OCDC contacted Respondent by letter and informed Respondent that, to date, the OCDC had not received a written response to the complaint of Larry Mackey. **App. 39; 795-796**. In its July 20, 2010 letter, the OCDC demanded that Respondent respond to the complaint no later than July 28, 2010, or be subject to a subpoena for appearance in Jefferson City, Missouri. **App. 39; 795-796**. The OCDC did not receive Respondent's written response to the complaint. **App. 39**.

In August, 2010, the bankruptcy court dismissed and closed Mr. Mackey's adversary proceeding, due to deficiencies in the prosecution of the claim. **App. 195**. While Mr. Mackey may have collected a percentage of his judgment he would not have had the right to collect his judgment following a discharge of Timothy Bruce's Chapter 13 bankruptcy. **App. 39**. The handling of Mr. Mackey's claim in Timothy Bruce's bankruptcy created hardships for Mr. Mackey in that he has yet to collect the money from his judgment against Mr. Bruce, he missed time from work, and spent time trying to contact Respondent, all over the course of four years. **App. 67 (Tr. 74-75)**.

On or about July 29, 2011, almost two years after Respondent missed the deadline for filing Larry Mackey's adversarial complaint, Timothy Bruce's bankruptcy was dismissed for default in plan payments. **App. 801-819**. Though Larry Mackey can now pursue collection of his judgment against Timothy Bruce, Larry Mackey played no role in the dismissal of Timothy Bruce's bankruptcy and would characterize the dismissal as

something that happened by chance. **App. 68 (Tr. 78)**. Respondent admits that he "lucked out" in terms to the harm done to Mr. Mackey. **App. 101 (Tr. 211-212)**.

On or about September 30, 2010, the OCDC issued and served a subpoena on Respondent for his appearance in Jefferson City, Missouri. **App. 39; 797-798**. As of September, 2011, Larry Mackey could not say whether he received a check for $2000 from Respondent, but was certain that he had not received payments from Respondent towards the $3000 agreed to in the settlement contract. **App. 61-62 (Tr. 53-54)**.

David and Regina Foster

Count II of the Information

In or around March, 2005, Complainant, Regina Foster was hit, as a pedestrian, by an automobile. **App. 39; 132 (Tr. 337); 773**. Approximately one month later, Ms. Foster hired Respondent to represent her in a personal injury action after failing to reach a settlement agreement with the insurance company. **App. 39; 132 (Tr. 336-337); 773**.

On or about October 13, 2005, Nevada Regional Medical Center served Notice of Hospital Lien on Respondent for the cost of Ms. Foster's medical care. **App. 39; 132 (Tr. 337)**. As of November 3, 2005, Ms. Foster's bill from Nevada Regional Medical Center was $228.60. **App. 39; 132 (Tr. 337)**. As of October 10, 2005, Ms. Foster also owed $925.00 in medical bills to Industrial Physical Therapy. **App. 39; 132 (Tr. 337)**. Respondent had notice that as of 2007, Ms. Foster owed money to Industrial Physical Therapy. **App. 39; 132 (Tr. 337)**. On or about November 29, 2007, Dr. Brian Ellefsen of Southwest Missouri Orthopaedics Bone and Joint, Inc. served Notice of Doctor's Lien on Respondent claiming a lien in the sum of $381.00 for services rendered between July

and August, 2005. **App. 39; 132 (Tr. 337)**. On or about January 3, 2006, Respondent contacted MBA, Inc., representing Nevada Imaging, Inc., and informed them that Respondent represented Ms. Foster, that he was attempting to settle Ms. Foster's case with the insurance carrier and Respondent requested the medical provider's patience in attempting to collect an $80.00 radiology bill. **App. 39**. As of January 3, 2006, Ms. Foster's bill from Nevada Imaging, Inc. was $80.00. **App. 39**.

During a four year period of negotiation with the insurance company, Respondent repeatedly failed to return Ms. Foster's telephone calls or otherwise keep her apprised of the status of her case. **App. 773**. However, in or around June, 2009, Ms. Foster was able to settle her claim with the insurance company for $23,490.00. **App. 39; 133 (Tr. 338) 773; 775**. Pursuant to a contract for a contingency fee, Respondent withheld 40% of the settlement or $9,396.00. **App. 39; 133 (Tr. 339) 776-777**. Respondent withheld $146.00 in advanced costs. **App. 39; 776-777**. Respondent withheld $2,219.00 in total liens with $925 to Industrial Physical Therapy; $80 to Nevada Imaging; $361.00 to Dr. Ellefsen; and $833.00 to Nevada Regional Medical Center. **App. 39; 133 (Tr. 341) 776-777**. On or about July 13, 2009, Respondent issued Ms. Foster a check for $11,729.00. **App. 39; 778**.

Ms. Foster understood that Respondent would pay all liens and costs to her medical providers, immediately. **App. 39; 134 (Tr. 343)**. Respondent understood that he was holding the remaining lien money for the benefit of the third party medical providers whose liens had not been previously paid. **App. 134 (Tr. 344)**. Respondent also understood that he had an obligation to notify the third party medical providers that

Respondent was holding their settlement money. **App. 134 (Tr. 344)**. However, Respondent did not send the lien holders letters notifying them that Respondent had received their settlement money. **App. 134 (Tr. 344)**. Respondent called one of the four lien holders by telephone to notify them that the settlement money had been received. **App. 134 (Tr. 345)**. It was understood that any money withheld for medical liens that exceeded the ultimate lien paid belonged to Regina Foster. **App. 134 (Tr. 344)**.

On or around July 13, 2009, Respondent received a copy of a bill from Nevada Regional Medical Center indicating that Ms. Foster owed $228.60 to Nevada Regional Medical Center. **App. 39; 135 (Tr. 346)**. The July 13, 2009 bill from Nevada Regional Medical Center provided Respondent knowledge of the amount owed by Regina Foster after receipt of the settlement money. **App. 135 (Tr. 347)**. On or around December 7, 2009, Respondent received a copy of a bill from Industrial Physical Therapy indicating that Ms. Foster owed $995.42 to Industrial Physical Therapy. **App. 39; 135 (Tr. 347-348)**. On or around December 7, 2009, Respondent received a copy of a bill from Industrial Physical Therapy indicating that as of February 18, 2010, a $100.06 service fee would be added to Ms. Foster's bill from Industrial Physical Therapy, rendering Ms. Foster's bill $1,025.06. **App. 39**. On or about January 7, 2010, Respondent received a copy of a bill from Industrial Physical Therapy indicating that Ms. Foster now owed $1,010.13 to Industrial Physical Therapy. **App. 39**. On or around March 5, 2010, Respondent received a copy of a bill from Industrial Physical Therapy indicating that Ms. Foster now owed $1,039.99 to Industrial Physical Therapy. **App. 39**. On or around May

7, 2010, Respondent received a copy of a bill from Industrial Physical Therapy indicating that Ms. Foster now owed $1,070.97 to Industrial Physical Therapy. **App. 39**.

Ms. Foster accurately believed that she was owed some refund from the money Respondent withheld for liens and costs. **App. 39; 773**. Ms. Foster began calling Respondent over a period of several months, but Respondent failed to return Ms. Foster's telephone calls or otherwise contact Ms. Foster. **App. 39; 773**. On or about March 22, 2010, Ms. Foster filed a complaint against Respondent with the OCDC. **App. 39; 772-774**. As of the date that Ms. Foster filed her complaint with the OCDC, Respondent had not paid any of the costs or liens for which he withheld money. **App. 39; 136 (Tr. 350)**.

On or around April 30, 2010, Respondent paid the $228.60 lien held by Nevada Regional Medical Center to the Berlin Wheeler Collection Agency. **App. 39; 136 (Tr. 350); 781-782**. On or about April 30, 2010, Respondent paid the $925.00 lien held by Industrial Physical Therapy, Inc. **App. 39; 136 (Tr. 350); 779-780**. The $228.60 and $925.00 owed to Nevada Regional Medical Center and Industrial Physical Therapy, Inc., respectively, were held for ten months in Respondent's non-interest bearing IOLTA account. **App. 137 (Tr. 357)**. Respondent did not refund Regina Foster's settlement money, $1,065, previously held for liens, until after Regina Foster filed a complaint with the OCDC. **App. 138 (Tr. 359)**.

From July, 2009, to April, 2010, Ms. Sherry Simpson was employed as Respondent's secretary. Admitted. **App. 39; 135 (Tr. 348-349); 153 (Tr. 419)**. Respondent contends that Ms. Simpson failed to promptly give him letters received in the mail, failed to appropriately file documents and failed to give him every telephone

message received. **App. 140-143 (Tr. 367-379)**. However, documents not properly filed or remitted by Sherry Simpson to Respondent were not documents that impacted Respondent's cases enough for him to notice that they were missing from his case files. **App. 146 (Tr. 391)**. Respondent contends that Ms. Simpson began missing work in August, 2009, approximately two months after she was hired, yet Ms. Simpson continued to work with Respondent for eight to nine more months. **App. 147 (Tr. 394)**. At no time did Ms. Simpson have the authority to write checks from Respondent's trust account. **App. 39; 137 (Tr. 356)**. Respondent contends that he advised Ms. Simpson to prepare checks to Ms. Foster's lien holders so that he could sign and mail the checks to creditors. **App. 135 (Tr. 347)**. However, Respondent knew that Ms. Simpson had not prepared checks for the lien holders, but failed to write and send the checks, himself. **App. 137 (Tr. 356)**. Respondent contends that Ms. Foster's lien holders were not paid until April, 2010, because Respondent's secretary did not prepare the checks for his signature. **App. 137 (Tr. 354); 137 (Tr. 356)**.

Sara Foster

Count III of the Information

On or about June 11, 2009, Complainants, Sara and Christopher Foster ("the Fosters") hired Respondent's wife, Stephanie Swischer, to effect a step-parent adoption.[1] **App. 39**. At that time, Respondent was practicing as a lawyer in his wife, Stephanie's

[1] At the time that the Fosters obtained Stephanie Swischer's services, the Fosters informed Stephanie Swischer that the children's biological father had previously agreed to terminate his parental rights and allow the children's stepfather to adopt the two boys.

solo firm. **App. 39; 124 (Tr. 303)**. The Fosters paid Stephanie Swischer a total of $800.00 for the representation. **App. 39; 124 (Tr. 303); 765**. Approximately one month later, Stephanie Swischer filed the following documents in the Circuit Court of Bates County, Missouri:

1. Petitioner's Motion to Appoint Guardian Ad Litem in the case of W.J.B.;
2. Petitioner's Motion to Appoint Guardian Ad Litem in the case of C.M.B.;
3. Consent to Adoption in the case of W.J.B., wherein the natural mother consented to the adoption of the minor child;
4. Consent to Adoption in the case of C.M.B., wherein the natural mother consented to the adoption of the minor child;
5. Admission of Paternity and Consent to Adoption in the case of W.J.B., wherein the biological father consented to the step-parent adoption;
6. Admission of Paternity and Consent to Adoption in the case of C.M.B., wherein the biological father consented to the step-parent adoption;
7. Petition for Transfer of Custody and Adoption in the case of W.J.B., wherein Petitioners moved the court to effectuate the step-parent adoption;

8. Petition for Transfer of Custody and Adoption in the case of C.M.B., wherein Petitioners moved the court to effectuate the step-parent adoption;

9. Motion to Waive Investigation in the case of W.J.B., due to consent forms having been signed by both biological parents; and

10. Motion to Waive Investigation in the case of C.M.B., due to consent forms having been signed by both biological parents.

App. 39; 712-737; 738-761. Immediately thereafter, the Court appointed Brandon Kinney to serve as the GAL in the cases of W.J.B. and C.M.B. **App. 39; 712; 738**.

In or around July-August, 2009, Stephanie Swischer left her law practice to stay at home. **App. 39; 124 (Tr. 305)**. Respondent assumed representation of Stephanie Swischer's clients, including the Fosters. **App. 39; (Tr. 305)**. The Fosters understood that all paperwork would be completed and the adoption effectuated by December, 2009. **App. 762-764**. However, Respondent did not conduct a review of his wife's case files in such a manner as to make Respondent aware that Sara Foster's adoption matter was pending under Respondent's representation. **App. 126 (Tr. 312)**. Following Stephanie Swischer's departure from the law practice, the Fosters attempted to contact Respondent by telephone on numerous occasions. **App. 762-764**. Respondent received multiple messages from the Fosters, but failed to return their telephone calls. **App. 39; 762-764**.

On or about August 17, 2009, Brandon Kinney, the court-appointed GAL, contacted Respondent by letter and requested that the Fosters contact him immediately so that Mr. Kinney could meet the children. **App. 125 (Tr. 306); 766**. The letter referenced

two children, Charles and Wyatt. **App. 766**. Thereafter, Respondent contacted the GAL and told the GAL that he had been misinformed about his appointment and that he was not, in fact, the appointed GAL for W.J.B. and C.M.B. **App. 721; 746**. The GAL closed his file and took no further steps to investigate the W.J.B. and C.M.B. adoption. **App. 721; 746**. Respondent contends that he was involved in another matter, *Feuerborn v. Feuerborn*, where the children had the same names as Ms. Foster's children and that Respondent was confused about which case the GAL was referring to when the GAL wrote to Respondent in August, 2009. **App. 125 (Tr. 309)**. In the *Feuerborn* case, the custody dispute involved only one child subject to the Court's jurisdiction and only one child was referred to in Court documents. **App. 126 (Tr. 311) 767-769**. The GAL, Mr. Kinney, stated in his August 17, 2009 letter to Respondent, "[p]lease call if you have any questions." **App. 766**. Respondent never spoke to Mr. Kinney. **App. 132 (Tr. 335)**.

The Fosters continued to try and contact Respondent, but received no return telephone calls. **App. 762-764**. Respondent's telephone log indicates that on January 15, 2010, Respondent received a message from Sara Foster referencing "Charles and Wyatt Burton." **App. 581**. Respondent's telephone log also indicates that on January 21, 2010, Respondent received another message from Sara Foster. **App. 581**.

Respondent testified at his deposition that he became aware of Sara Foster's case in February, 2010.[2] **App. 175 (Tr. 62-63)**. Respondent testified at his disciplinary

[2] Respondent: "Because I don't believe I—I don't believe that I knew about Sara Foster's adoption case until –I guess it would have been February of 2010 that they called

hearing that he did not become aware that he was representing Ms. Foster in her adoption until late April, 2010, after she filed her complaint with the OCDC.[3] **App. 126 (Tr. 312)**. On or about February 18, 2010, the Fosters scheduled a meeting with Respondent for the purpose of obtaining a status update on their case. **App. 39; 762-764**. Ms. Foster drove approximately one hour to attend the meeting. **App. 762-764**. Respondent did not appear for the meeting, nor did Respondent call Ms. Foster ahead of time to cancel the meeting. **App. 39; 762-764**.

In March, 2010, the Fosters filed a complaint with the OCDC. **App. 39; 762-764**. On or about April 19, 2010, the OCDC contacted Respondent and informed him that the Fosters had filed a complaint. **App. 39; 770**. Approximately one month later, Respondent contacted the GAL and told Mr. Kinney that his services were needed in the adoption case. **App. 39; 127 (Tr. 317); 771**. Respondent did nothing from February,

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and wanted to have an appointment. So that would have been when it became—when I became aware that my wife had filed an adoption case for them."

[3] Q. You became aware that you had this case in February 2010. Did you do anything in March of 2010 to advance Ms. Foster's case?

A: I don't know as if I became fully aware of this case until after the complaint was filed. In February of 2010 it was my understanding her appointment was regarding Regina Foster's money that was being held in our trust account to pay liens. . . I believe the first time I became aware that there was an open adoption file with Sarah Foster was after the complaint was filed.

2010 to May 19, 2010, to work on Sara Foster's adoption case. **App. 127 (Tr. 315-316); 176 (Tr. 66)**. Following the filings of Respondent's wife on July 14, 2009, the only thing required to complete work on the case was a report from the GAL. **App. 129 (Tr. 323)**. On or about June 17, 2010, the GAL filed his report and recommendation in the adoption case and recommended that the adoption be approved. **App. 39; 712-737; 738-761**. Thereafter, the Court entered a Judgment of Adoption in both cases. **App. 39; 712-737; 738-761**. After receiving Ms. Foster's complaint to the OCDC, Respondent contacted Ms. Foster and asked her if she would withdraw her complaint from the OCDC. **App. 129 (Tr. 322)**.

Bonnie Rash

Count IV of the Information

In or around March, 2009, Respondent was hired by Bonnie Rash to represent her in a divorce and custody action. **App. 39; 91 (Tr. 170)**. On or about September 24, 2010, the Circuit Court of Cedar County, Missouri ordered the marriage dissolved. **App. 39; 90 (Tr. 169)**. During the one and a half year period in which Respondent was representing Ms. Rash, Respondent did not communicate information by telephone, letter, or other mechanism so as to inform Ms. Rash about the status of her case. **App. 91 (Tr. 171); 91 (Tr. 173); 783-784**. When Ms. Rash could not reach Respondent at the office or could not get a return phone call, she left many messages on his cellular telephone, but only received a return call on one or two occasions. **App. 92 (Tr. 176-177)**. Respondent did not return Ms. Rash's telephone calls in such a way as to appropriately advise Ms. Rash of the status of her divorce. **App. 91 (Tr. 172); 783-784**.

In or around April, 2010, Ms. Rash appeared for a pre-trial conference. **App. 783-784** Respondent did not appear on her behalf. **App. 783-784**. The Judge instructed Ms. Rash to telephone her attorney, which frustrated Ms. Rash as she felt that Respondent would not return her telephone calls. **App. 783-784**. Respondent requested paperwork from Ms. Rash and within two weeks Ms. Rash provided the requested paperwork. **App. 95 (Tr. 189)**. Approximately three to four months after providing Respondent paperwork, Respondent contacted Ms. Rash and informed her that he had lost the paperwork and that Ms. Rash would need to send the paperwork again. **App. 95 (Tr. 189-190)**.

In or around May, 2010, Ms. Rash contacted the Missouri Attorney General's Office Consumer Protection Unit, alleging that Respondent failed to return her telephone calls and "leaves her in the dark" about what is happening in her case. **App. 39; 783-784**. Thereafter, the OCDC received a complaint from Ms. Rash, forwarded by the Missouri Attorney General's Office. **App. 39; 91-92 (Tr. 173-174)**. On or about June 16, 2010, the OCDC notified Respondent of the complaint by letter and requested Respondent's written response no later than June 30, 2010. **App. 39; 785**. The OCDC did not receive Respondent's written response on or before June 30, 2010. **App. 39**. On or about July 6, 2010, the OCDC contacted Respondent by letter and again requested Respondent's written response to the complaint, reminding Respondent of his obligation to respond, and requesting a response no later than July 13, 2010. **App 39; 786**. The OCDC did not receive Respondent's written response on or before July 13, 2010. **App. 39**. On or about July 20, 2010, the OCDC contacted Respondent and again requested Respondent's

written response to the complaint be received no later than July 26, 2010. **App. 39; 787-788**.

In or around July, 2010, two to three weeks before Ms. Rash's divorce trial, Respondent informed Ms. Rash that if she did not withdraw her complaint from the OCDC, Respondent would terminate the attorney-client relationship. **App. 92 (Tr. 174)**. Because Ms. Rash had a scheduled court date and because she did not feel that she could afford a new attorney, Ms. Rash agreed to withdraw her complaint from the OCDC, even though she felt that Respondent was not giving her information and things were not getting done appropriately. **App. 92 (Tr. 174-175)**. The OCDC received Respondent's response to the complaint on or about July 26, 2010. **App. 39; 789-790**.

Charles Gossett

Count V of the Information

On or about July 23, 2007, Complainant, Charles Gossett, underwent a six way coronary bypass surgery at St. John's Regional Medical Center in Joplin, Missouri. **App. 39; 75 (Tr. 107)**. After the surgery, the sterna incision made to perform Mr. Gossett's bypass surgery showed signs of drainage. **App. 39**. On or about July 30, 2007, gram stains of the sterna wound were taken and subsequently grew two different strains of bacteria (E.coli). **App. 39; 75 (Tr. 107)**. Mr. Gossett's physician performed Mediastinal exploration, debridement, irrigation, substeral drainage and secondary closure. **App. 39; 75 (Tr. 107)**. A deep wound culture was taken for the purpose of determining the type of bacteria residing in Mr. Gossett's incision and the lab results showed the deep wound culture had grown Staphylococcus Epidermidis originating from a female. **App. 39; 75**

(Tr. 108). Mr. Gossett received several rounds of IV antibiotic treatment over the course of two months. **App. 39; 75 (Tr. 107-108)**. On or about January 30, 2008, Mr. Gossett returned to St. John's Regional Medical Center after suffering from chest pain. **App. 39**. Procedures revealed that one of the six vein grafts taken from Mr. Gossett's leg used for the bypass surgery on or about July 23, 2007 had failed. **App. 39; 75 (Tr. 108)**. The graft was thereafter successfully repaired. **App. 39**. As a result of the mounting hospital bills, Mr. Gossett and his wife decided to file for bankruptcy. **App. 39; 75 (Tr. 109)**.

The Gossetts contacted Respondent while Respondent was working for his father's firm. **App. 39; 75 (Tr. 109)**. Respondent agreed to represent the Gossetts in a Chapter 13 Bankruptcy proceeding. **App. 39; 76 (Tr. 110)**. At the same time, Mr. Gossett requested that Respondent consider representing him in a medical malpractice action stemming from the infection and failed bypass graft that Mr. Gossett received while at St. John's Regional Medical Center. **App. 39; 76 (Tr. 110)**. In or around June, 2008, Respondent agreed to represent Mr. Gossett in a medical malpractice action against the original treating physician, the hospital and various other individuals and entities. **App. 39; 76 (Tr. 110)**. Mr. Gossett hired Respondent as his attorney and not any other member of his father's firm. **App. 76 (Tr. 110)**. Respondent told Mr. Gossett that he had a good claim that was likely to result in the recovery of damages. **App. 76 (Tr. 111)**.

Respondent and Mr. Gossett entered into a contingency agreement whereby Respondent agreed to advance costs, including those for a medical expert. **App. 39; 76 (Tr. 111-112)**. Respondent informed Mr. Gossett that he may have to hire co-counsel to help fund the case. **App. 77 (Tr. 114)**. Mr. Gossett understood that if Respondent

needed to hire co-counsel to help fund the case, Respondent would inform Mr. Gossett. **App. 77 (Tr. 114)**. Respondent and Mr. Gossett's contingency agreement also provided that Respondent would retain 30-35% of any recovery. **App. 76 (Tr. 111-112)**. Respondent and Mr. Gossett's contingency agreement was not originally reduced to writing.[4] **App. 80-81 (Tr. 129-130); 111 (Tr. 250)**.

On or about July 22, 2009, Respondent filed a Petition for Damages in Medical Malpractice on behalf of Mr. Gossett in the Circuit Court of Jasper County, Missouri. **App. 39; 625-704**. The defendants in the medical malpractice action entered appearances and filed answers. **App. 39; 625-704**. On or about August 11, 2009, counsel for the hospital served Opening Interrogatories on Respondent and on August 28, 2009, counsel for Mr. Gossett's physician and practice group served Opening Interrogatories and First Requests for Production of Documents on Respondent. **App. 39; 625-704**. Respondent failed to respond to any of the discovery requests within the time required by law. **App. 39; 625-704**. On or about October 5, 2009, counsel for the hospital sent a Golden Rule letter to Respondent. **App. 39; 799**. Three days later, counsel for Mr. Gossett's physician and practice group sent a Golden Rule letter to Respondent. **App. 39; 800**.

[4] In December, 2010, after Mr. Gossett filed a complaint with the OCDC, Respondent asked Mr. Gossett to execute a written contingency agreement and Mr. Gossett testified that this is the only employment contract that Mr. Gossett ever signed. Respondent can produce no other written contingency agreement.

Respondent failed to provide any discovery responses to the requesting parties. **App. 39; 625-704**.

Missouri statute requires a plaintiff to file an affidavit of merit from an expert within the first 90 days of filing a medical malpractice action. **App. 111 (Tr. 251); 178 (Tr. 75)**. Respondent was aware of the 90-day requirement for filing an affidavit of merit prior to filing Mr. Gossett's petition. **App. 114 (Tr. 262)**. Mr. Gossett understood that Respondent would locate an appropriate expert. **App. 77 (Tr. 117)**. As of October 22, 2009, Respondent had not filed an affidavit of merit from a medical expert. **App. 39**. On or about October 22, 2009, Respondent filed a Motion for Extension of Time to file Affidavits, citing the medical condition of his child as the reason for delay in filing an affidavit of merit. **App. 39**. One day later, counsel for the hospital filed a motion to compel discovery responses and a similar motion from counsel for Mr. Gossett's physician followed. **App. 39; 625-704**. The motions to compel were to be called up for hearing on December 23, 2009. **App. 39; 625-704**. Respondent did not inform Mr. Gossett that Respondent had failed to previously provide any of the discovery responses outlined in the motions to compel. **App. 77 (Tr. 116)**.

On or about December 23, 2009, Respondent filed a motion to dismiss Mr. Gossett's case without prejudice. **App. 39; 625-704**. Respondent dismissed the case because he had not found an expert to provide an affidavit of merit. **App. 178 (Tr. 76)**. Respondent believed that the decision to dismiss Mr. Gossett's case was his own to make. **App. 114 (Tr. 262)**. Respondent did not provide Mr. Gossett a copy of the motion to dismiss, nor did Respondent tell Mr. Gossett that Respondent would dismiss the case if

he was unable to fund the case. **App. 77 (Tr. 117); 78 (Tr. 119)**. Prior to filing for dismissal, Respondent did not tell Mr. Gossett that Respondent did not have the money to hire an expert. **App. 77-78 (Tr. 117-118)**. Respondent did not tell Mr. Gossett that Respondent moved to dismiss the case on December 23, 2009. **App. 78 (Tr. 118)**. Respondent testified that he had not previously hired an expert because, in his words:

> I might attempt to find co-counsel to work on the case with me to share some of the expenses, because, unlike my father, I do not have the funding for the kind of case that Mr. Gossett had, that his case would require, with the exception of a few times during the year probably. The second reason was simply the availability of such an expert at a reasonable price that I could afford to pay on my own.

App. 178 (Tr. 76). At the time that Respondent was required to hire and pay for a medical expert in Mr. Gossett's case, Respondent had $35,000-$40,000 in credit card debt, a one income household, only $2,000 in available credit, and states that he may have had to refinance his house to obtain additional money. **App. 112 (Tr. 257)**.

On or about January 12, 2010, the Court dismissed the medical malpractice case without prejudice. **App. 39; 625-704**. Respondent did not inform Mr. Gossett that his case had been dismissed. **App. 78 (Tr. 118)**. Mr. Gossett learned that his case had been dismissed after researching the status of the case on the internet. **App. 78 (Tr. 118)**. From January, 2010 to June, 2010, Mr. Gossett continually tried to reach Respondent by telephone. **App. 78 (Tr. 119); 78 (Tr. 121)**. Respondent did not return Mr. Gossett's telephone calls. **App. 78 (Tr. 119); 78 (Tr. 121)**. In or around June, 2010, Mr. Gossett made an appointment with Respondent to discuss the dismissal of his medical

malpractice action. **App. 39; 78 (Tr. 119); 78 (Tr. 121)**. The June, 2010 meeting was the first time that Mr. Gossett spoke with Respondent after having learned of the dismissal of his case in January, 2010. **App. 78 (Tr. 121)**. At the June, 2010 meeting, Respondent told Mr. Gossett that Mr. Gossett still had a good case. **App. 78 (Tr. 120); 705-706**. Respondent also told Mr. Gossett that the reason he was required to dismiss the case was because Respondent was "conflicted out" of being able to represent Mr. Gossett. **App. 707**. In a letter dated June 18, 2010, Respondent told Mr. Gossett that the "conflict of interest" would prevent Respondent from further representing Mr. Gossett. **App. 707**. Respondent told Mr. Gossett that he would find another lawyer to handle the case. **App. 707**.

Following the June, 2010 meeting with Respondent, Mr. Gossett continually tried to contact Respondent by telephone. **App. 705-706**. Respondent failed to return Mr. Gossett's telephone calls or otherwise apprise Mr. Gossett of the status of his matter. **App. 705-706**. In or around August 18, 2010, Mr. Gossett filed a complaint with the OCDC. **App. 39; 705-706.** Following the filing of Mr. Gossett's complaint with the OCDC, Respondent provided Mr. Gossett with the name of two attorneys and told Mr. Gossett to inquire as to whether one of the attorneys would take Mr. Gossett's medical malpractice action. **App. 39; 81 (Tr. 133)**. Mr. Gossett contacted the two attorneys; one declined to take the case and one never returned Mr. Gossett's telephone call. **App. 81 (Tr. 132)**. With a very short time remaining in which to refile Mr. Gossett's malpractice action, Respondent told Mr. Gossett that Respondent would represent him in the refiling of the case. **App. 39; 81 (Tr. 132)**.

On or about December 10, 2010, Respondent executed a written contingency agreement with Mr. Gossett. **App. 39; 80 (Tr. 129); 708-711**. On or about December 22, 2010, with only a few days remaining before the statute of limitations ran, Respondent refiled Mr. Gossett's medical malpractice action against St. Luke's et al. **App. 39; 625-704**.

Disciplinary Proceeding

An Information was filed with the Advisory Committee on April 1, 2011, setting forth Informant's belief that probable cause existed to establish that Respondent violated multiple Rules of Professional Conduct. **App. 235**. On or about May 16, 2011, Respondent filed a Motion to Extend Time to File Answer or in the Alternative to File a Joint Stipulation in Lieu of Answer. **App. 36-37**. Respondent was given until June 20, 2011 to file his Answer and thereafter filed his Answer on June 21, 2011. **App. 38**. Respondent admitted approximately 191 paragraphs in the charging Information. **App. 39-42**. A hearing panel was appointed on or about July 26, 2011. **App. 43-47**.

The disciplinary hearing took place on September 29, 2011. **App. 48-156**. By order of the Presiding Officer of the Disciplinary Hearing Panel, both Informant and Respondent submitted Proposed Findings of Fact, Conclusions of Law and Recommendations for Sanction at the end of October, 2011. **App. 48-156**. On or about December 5, 2011, the Disciplinary Hearing Panel issued its Decision. **App. 822-865**. There were 28 violations of Rule charged in the Information and the Panel found 25 violations of Rule following the hearing. **App. 822-865**. The Disciplinary Hearing Panel ultimately recommended that Respondent be suspended with no reinstatement to be

entertained for a period of at least two years. **App. 822-865**. On or about December 10, 2011, the Advisory Committee issued its letter directing the parties to file written notices of acceptance or rejection within 30 days of its letter. **App. 821**. On or about December 22, 2011, Informant filed its written acceptance of the Disciplinary Hearing Panel's Decision. **App. 866**. On or about December 27, 2011, Respondent filed his rejection of the Disciplinary Hearing Panel's Decision, which brings the matter before this Court. **App. 867**.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS OR MAKE REASONABLE EFFORTS TO EXPEDITE LITIGATION ON BEHALF OF HIS CLIENTS IN VIOLATION OF RULES 4-1.3 and 4-3.2 IN THAT RESPONDENT:

a. **FAILED TO ATTEND THE MEETING OF CREDITORS, CONDUCT A 2004 EXAMINATION OR FILE AN ADVERSARY COMPLAINT ON BEHALF OF LARRY MACKEY;**

b. **FAILED TO TIMELY PAY THE MEDICAL LIENS OR EXCESS SETTLEMENT FUNDS FOR REGINA FOSTER;**

c. **FAILED TO TAKE ANY ACTION DURING A TEN MONTH PERIOD IN SARA FOSTER'S ADOPTION PROCEEDING; AND**

d. **FAILED TO RESPOND TO DISCOVERY, FAILED TO FILE AN AFFIDAVIT OF MERIT AND FAILED TO REFILE CHARLES GOSSETT'S MALPRACTICE ACTION IN A TIMELY MANNER.**

In re Crews, 159 S.W.3d 355, 358 (Mo. banc 2005)

Broome v. Mississippi Bar, 603 So.2d 349, 352 (Ms. 1992)

In re Ehler, 319 S.W.3d 442, 449 (Mo. banc 2010)

Lawyer Disciplinary Bd. v. Hardin, 619 S.E.2d 172, 176 (W.V. 2005)

Section 538.225 RSMo

Rule 4-1.3

Rule 4-3.2

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO ADEQUATELY COMMUNICATE WITH HIS CLIENTS IN VIOLATION OF RULE 4-1.4 IN THAT RESPONDENT ROUTINELY REFUSED TO TAKE OR RETURN TELEPHONE CALLS FROM CLIENTS AND FAILED TO KEEP HIS CLIENTS REASONABLY INFORMED ABOUT THE STATUS OF THEIR LEGAL MATTERS.

Cleveland Metro Bar Assn. v. Sherman, 929 N.E.2d 1061, 1063 (Oh. 2010)

In re Sims, 994 So.2d 1280, 1282 (La 2008)

Rule 4-1.2

Rule 4-1.4

ABA/BNA Lawyers Manual on Professional Conduct, *Lawyer Client Relationship* § 31:501 (2005)

POINTS RELIED ON

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO SAFEKEEP THE FUNDS OF HIS CLIENT AND THIRD PARTY MEDICAL PROVIDERS IN VIOLATION OF RULE 4-1.15(i) IN THAT UPON RECEIVING FUNDS BELONGING TO HIS CLIENT AND OTHER THIRD PARTY MEDICAL PROVIDERS, RESPONDENT FAILED TO PROMPTLY NOTIFY THE PARTIES OF THE RECEIPT OR DELIVER THE FUNDS TO THE APPROPRIATE RECIPIENT.

In the Matter of St. Onge, 958 A.2d 143, 144 (R.I. 2008)

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010)

Attorney Grievance v. Zuckerman, 872 A.2d 693, 710 (Md. 2005)

Rule 4-1.15

POINTS RELIED ON

IV.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT KNOWINGLY FAILED TO RESPOND TO LAWFUL DEMANDS FOR INFORMATION FROM THE OFFICE OF CHIEF DISCIPLINARY COUNSEL DURING THE COURSE OF TWO DISCIPLINARY INVESTIGATIONS IN VIOLATION OF RULE 4-8.1(c).

Lake County Bar Assoc. v. Vala, 693 N.E.2d 1084, 1084 (Ohio 1998)

In re Cutting, 671 N.W.2d 173, 175 (Minn. 2003)

In re Donaho, 98 S.W.3d 871, 874 (Mo. banc 2003)

In re Staab, 719 S.W.2d 780, 784 (Mo. banc 1986)

Rule 8.1(c)

POINTS RELIED ON

V.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO MAKE REASONABLE EFFORTS TO ENSURE THAT HIS NON-LAWYER ASSISTANT'S CONDUCT WAS COMPATIBLE WITH RESPONDENT'S PROFESSIONAL OBLIGATIONS IN VIOLATION OF RULE 4-5.3(b) IN THAT RESPONDENT ASSERTS THAT HIS SECRETARY FAILED TO GIVE HIM TELEPHONE MESSAGES AND CASE DOCUMENTS CAUSING RESPONDENT DELAY IN FORWARDING CLIENT AND THIRD PARTY FUNDS AND RESPONDING TO CLIENTS AND DISCIPLINARY AUTHORITIES.

Attorney Griev. Comm'n v. Goldberg, 441 A.2d 338, 341 (Md. 1982)

Matter of Struthers, 877 P.2d 789, 792 (Az. 1994)

Attorney Griev. Comm'n v. Mooney, 753 A.2d 17 (Ct. App. Md. 2000)

In re Cater, 887 A.2d 1 (Dist. Columbia Ct. App. 2005)

Rule 5.3(b)

POINTS RELIED ON

VI.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT ENGAGED IN CONDUCT THAT WAS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE IN VIOLATION OF RULE 4-8.4(d) IN THAT RESPONDENT DRAFTED AND ENTERED INTO A CLIENT CONTRACT THAT PURPORTED TO PROHIBIT HIS CLIENT'S COOPERATION WITH A DISCIPLINARY INVESTIGATION.

In re Conduct of Paulson, 216 P.3d 859, 865 (Or. 2009)

Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Miller, 568 N.W.2d 665, 667 (Ia. 1997)

Committee on Prof'l Ethics & Conduct v. McCullough, 468 N.W.2d 458, 462 (Iowa 1991)

Rule 4-8.4(d)

POINTS RELIED ON

VII.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO REDUCE HIS CONTINGENCY FEE CONTRACT TO WRITING IN VIOLATION OF RULE 4-1.5(c).

Baker v. Whitaker, 887 S.W.2d 664, 669 (Mo. App. W.D. 1994)

Rule 4-1.5(c)

POINTS RELIED ON

VIII.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO REAPPLY FOR A PERIOD OF TWO YEARS BECAUSE SUSPENSION IS APPROPRIATE WHEN AN ATTORNEY:

a. KNOWINGLY FAILS TO PROVIDE SERVICES TO A CLIENT OR ENGAGES IN A PATTERN OF NEGLECT BY FAILING TO COMMUNICATE OR DILIGENTLY PURSUE A CLIENT MATTER;

b. CAUSES AN ADVERSE OR POTENTIALLY ADVERSE EFFECT ON A LEGAL PROCEEDING;

c. KNOWS OR SHOULD KNOW THAT HE IS DEALING IMPROPERLY WITH CLIENT OR THIRD PARTY FUNDS; AND

d. KNOWINGLY ENGAGES IN CONDUCT THAT IS A VIOLATION OF A DUTY OWED TO THE PROFESSION.

In re Crews, 159 S.W.3d 355, 360 (Mo. banc 2005)

In re Donaho, 98 S.W.3d 871 (Mo. banc 2003)

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010)

In re Disciplinary Action Against Cowan, 540 N.W.2d 825, 827 (Minn. 1995)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

Rule 4-8.1

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS OR MAKE REASONABLE EFFORTS TO EXPEDITE LITIGATION ON BEHALF OF HIS CLIENTS IN VIOLATION OF RULES 4-1.3 and 4-3.2 IN THAT RESPONDENT:

a. **FAILED TO ATTEND THE MEETING OF CREDITORS, CONDUCT A 2004 EXAMINATION OR FILE AN ADVERSARY COMPLAINT ON BEHALF OF LARRY MACKEY;**

b. **FAILED TO TIMELY PAY THE MEDICAL LIENS OR EXCESS SETTLEMENT FUNDS FOR REGINA FOSTER;**

c. **FAILED TO TAKE ANY ACTION DURING A TEN MONTH PERIOD IN SARA FOSTER'S ADOPTION PROCEEDING; AND**

d. **FAILED TO RESPOND TO DISCOVERY, FAILED TO FILE AN AFFIDAVIT OF MERIT AND FAILED TO REFILE CHARLES GOSSETT'S MALPRACTICE ACTION IN A TIMELY MANNER.**

A disciplinary hearing panel's recommendation is advisory in nature. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). In a disciplinary matter such as this, the Missouri Supreme Court conducts a *de novo* review of the evidence and reaches its own conclusions of law. *Id*. Discipline will not be imposed unless professional misconduct is proven by a preponderance of the evidence. *Id*. Where misconduct is proven by a preponderance of the evidence, violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004).

In 1986, Missouri adopted the American Bar Association's Model Rules of Professional Conduct and though the Rules in Missouri now exist with variation, the Model Rules are used by a majority of other states, making other state disciplinary cases relevant to Missouri disciplinary matters. *State ex rel. Horn v. Ray*, 138 S.W.3d 729 (Mo.App. E.D. 2002) and www.abanet.org/cpr/mrpc/model_rules.html (last visited October 24, 2008) (indicating that California, New York and Maine are the only states that have not adopted professional conduct rules that follow the format of the ABA Model Rules). See also *In re Cupples*, 952 S.W.2d 226 (Mo. banc 1997) and *In re Belz*, 258 S.W.3d 38 (Mo. banc 2008) (where this Court analyzed other state disciplinary law in reaching a conclusion in Missouri).

a. Failure to Attend the Meeting of Creditors, Conduct a 2004 Examination or File an Adversary Complaint for Larry Mackey

Rule 4-1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." When Respondent agreed to attend the Meeting of Creditors and conduct a 2004 Examination on behalf of Larry Mackey, Rule 4-1.3

required that Respondent do so with diligence and promptness. The duty to act with reasonable diligence includes the tracking of dates upon which hearings, trials and deposition are to occur. *Tiller v. Semonis*, 635 N.E.2d 572, 574 (Ill. Ct. App. 1994). In the present action, Respondent failed to attend the Meeting of Creditors, asserting that he incorrectly calendared the event. Though Respondent admits that he failed to attend the meeting, Respondent would contend that his failure to attend did not injure Mr. Mackey because it was not ultimately determinative of Mr. Mackey's ability to succeed in filing an adversary complaint. Such is not the point. Respondent agreed with Mr. Mackey in their employment contract to attend the Meeting of Creditors. At some point Respondent must have thought that attendance at the meeting would be beneficial or surely Respondent would not have accepted fees to attend the meeting. The same is true of Respondent's agreement to conduct a 2004 Examination. When the debtor did not appear for Mr. Mackey's scheduled 2004 Examination, Respondent did not pursue the matter any further. "Accepting legal fees and then failing to carry out contracts for employment is tantamount to theft of client funds. . [.]" *Disciplinary Counsel v. Zigan*, 887 N.E.2d 334, 340 (Oh. 2008) quoting *Columbus Bar Assn. v. Moushey*, 819 N.E.2d 1112, 16 (remaining cite omitted by Court). Even when the client's interests are not substantively injured, an attorney's failure to diligently pursue client matters can undermine confidence in the lawyer's trustworthiness. Rule 4-1.3, Comment [3]. Respondent agreed to complete certain objectives during the representation and his failure to do so constitutes a violation of Rule 4-1.3.

Civil judgments like Mr. Mackey's can be discharged in a debtor's bankruptcy unless a creditor brings an adversary action to determine that such debt is excepted from the discharge. *In re Harbaugh*, 2003 WL 21057065 (B.A.P. 8th Cir. 2003) (citing 11 U.S.C.A. Section 523). The statutes governing the timeline for the filing of an adversary complaint are analogous to statutes of limitations and are strictly construed. *In re Bozeman*, 226 B.R. 627, 630 (B.A.P. 8th Cir. 1998). Respondent agreed to file an adversary complaint on behalf of Mr. Mackey in Timothy Bruce's bankruptcy proceeding, but failed to follow through with his obligation. As a result, Mr. Mackey had no other mechanism in bankruptcy to collect his judgment were the debt to be discharged. The importance of filing deadlines is recognized in Comment [3] of Rule 4-1.3, where it states, "[a] client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed." In the present circumstance, Respondent's failure to file an adversary complaint destroyed Mr. Mackey's legal position. In the case of *Broome v. Mississippi Bar*, an attorney was suspended after missing the statute of limitations for filing of a client tort action. 603 So.2d 349, 352 (Ms. 1992). The Mississippi Supreme Court found that where an attorney misses a statute of limitations through neglect or inadequate preparation, a severe sanction is appropriate. *Id*. citing *Steighner v. Mississippi State Bar*, 548 So.2d 1294 (Miss. 1989); *Fougerousse v. Mississippi State Bar*, 563 So.2d 1363 (Miss. 1990).

In the present case, Respondent's failure to file a timely adversary complaint was tantamount to missing a statute of limitations. Luckily for Mr. Mackey, the debtor's

bankruptcy proceeding was ultimately dismissed after the debtor failed to make plan payments. Though Mr. Mackey has been unsuccessful in collecting his judgment, he could theoretically do so now that his judgment has not been discharged in bankruptcy. However, similar to a mitigating factor, analysis of the injury or potential injury to a client is better examined as part of the sanction analysis and in no way affects a finding that Respondent committed a violation of Rule. See *In re Ehler*, 319 S.W.3d 442 (Mo. banc 2010) citing *In re Belz*, 258 S.W.3d 38, 42 (Mo. banc 2008).

b. Failure to Timely Pay Medical Liens or

Excess Settlement Money for Regina Foster

When Respondent withheld money from the settlement of Regina Foster to pay liens to medical care providers, Rule 4-1.3 required that Respondent notify the providers with diligence and promptness and that the monies be paid in the same fashion. In this case, however, Respondent did not notify any of the four providers by letter and can only recall telephoning one of the providers to notify them that Respondent was in possession of their lien money. Similarly, Respondent failed to pay any of the money to the medical providers until 11 months after receipt of the settlement check and did so only after Ms. Foster filed a complaint with the OCDC.

In the case of *Ehler*, this Court specifically found that an attorney's failure to turn money over to his client and to a third party following the sale of their marital home and receipt of the proceeds by the respondent attorney constituted a violation of Rule 4-1.3. In re *Ehler*, 319 S.W.3d 442, 449 (Mo. banc 2010). This Court's treatment of such violation is consistent with other states, including South Carolina, where the Supreme

Court of South Carolina found that attorneys in the state are routinely disciplined with severe sanctions for failing to remit settlement funds to clients, failing to remit funds to clients' medical providers, failing to pay bills and failing to pay taxes. *In re Gaines*, 559 S.E.2d 577 (S.C.2002) (citing *In re Godbold*, 521 S.E.2d 160 (1999). Respondent's conduct in this matter is made more inexcusable because he had notice of the amounts that Ms. Foster owed her medical providers on the date that the settlement check was received and with one exception (where Ms. Foster continued to incur penalties for late payment), the amounts owed did not change.

Respondent stated at hearing that a former secretary, who was not present to testify, was responsible for the delay in remitting the settlement proceeds because Respondent had asked her to write the checks and she failed to do so. At the same time, Respondent admitted that the secretary did not have signature authority on his checks and that he was aware that the checks had not been written. Respondent took no action to write the checks until after Ms. Foster filed her complaint with the OCDC. As the individual who withheld the settlement money, the Rules of Professional Conduct impart on Respondent, not his secretary, the obligation to notify the recipients promptly and remit the funds with diligence. As such, Respondent is the individual responsible for the violation of Rule 4-1.3.

c. Failure to Take Action during a 10 Month Period

in Sara Foster's Adoption

In addition to the requirements of Rule 4-1.3, Rule 4-3.2 provides that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the

client." A lawyer's work load must be controlled so that each matter can be handled competently. Rule 4-1.3, Comment [2]. In the present action, Respondent took over his wife's case load, including the adoption case of Sara Foster, when Respondent's wife left practice. Respondent's wife had previously filed all of the necessary documents to complete the step-parent adoption, except for the completed report of the GAL. Nevertheless, Respondent completed no work on the step-parent adoption. When the court-appointed GAL contacted Respondent to set up a meeting with his clients, Respondent told the GAL that he had been misinformed about the appointment and that his services were not needed. Respondent contends that he was unaware that he was representing Sara Foster, demonstrating that Respondent failed to conduct routine reviews of his caseload.

Thereafter, Sara Foster attempted to contact Respondent by telephone, but received no return telephone calls from Respondent. Had Respondent returned Ms. Foster's calls, Respondent would have been made aware that he was Ms. Foster's attorney and that he was neglecting Ms. Foster's adoption case. Ms. Foster made an appointment to visit Respondent and drove one hour to Respondent's office, only to find that Respondent was not present and would not be attending the meeting. In his deposition, Respondent testified that he did not become aware of Ms. Foster's case until after Ms. Foster filed a complaint with the OCDC. After learning of the complaint with OCDC, Respondent contacted the GAL and the adoption was completed in short order.

"Dilatory practices bring the administration of justice into disrepute." Rule 4-3.2, Comment [1]. In the present action, Respondent's neglect caused anxiety for Ms. Foster

and delayed the completion of her adoption proceeding for over 10 months. That Respondent claims not to have known that he was representing Ms. Foster is of no consequence. This Court found in the case of *Crews*, where an attorney delayed in filing a client petition, that the attorney's conduct does not have to be intentional to warrant discipline under Rule 4-1.3 and 4-3.2. *In re Crews*, 159 S.W.3d 355 (Mo. banc 2005). Respondent had many opportunities to make him aware of Ms. Foster's case and Respondent's neglect constitutes a clear violation of both Rules 4-1.3 and 4-3.2.

d. Failure to Respond to Discovery, Failure to File an Affidavit of Merit and Failure to Refile Charles Gossett's Action in a Timely Manner

When Respondent agreed to file Mr. Gossett's malpractice action, Respondent knew that a medical expert would be required and that an affidavit of merit would need to be filed. Section 538.225, RSMo, requires that in any action against a health care provider for damages for personal injury, the plaintiff shall file an affidavit with the court stating that he or she has obtained the written opinion of a legally qualified health care provider that states that the defendant failed to use reasonably prudent and careful care under the circumstances and that the failure contributed to cause the damages. The affidavit is to be filed no later than 90 days after the filing of the petition, unless, for good cause shown, the court orders that it be extended (not to exceed an additional 90 days). Knowing that Respondent would have 90 days after filing the petition to file an affidavit of merit, Respondent filed the petition and agreed to incur the costs for obtaining a medical expert.

Not long after filing the petition, Respondent was served with discovery requests from the opposing parties. Respondent did not reply to any discovery. After receiving Golden Rule letters from the parties, Respondent provided no discovery. By the time the Respondent was absolutely required to file an affidavit of merit, the opposing parties were calling up for hearing their motions to compel discovery. Still, Respondent did not file an affidavit and did not answer discovery. Instead, Respondent dismissed the case without the authority of his client. Respondent's failure to respond to discovery or to file the affidavit of merit constitutes violations of Rules 4-1.3 and 4-3.2.

In the case of *Hardin*, a respondent attorney was suspended for two years for failing to act with diligence in responding to discovery requests, and failing to make efforts to expedite litigation. *Lawyer Disciplinary Bd. v. Hardin*, 619 S.E. 2d 172, 176 (W.V. 2005). The Supreme Court of West Virginia said that the attorney's actions not only injured his client, but also provided "reason for the public to lessen their faith and confidence in the legal profession." *Id*. Missouri also recognizes the damage caused by dilatory practice. "Perhaps no professional shortcoming is more widely resented than procrastination." Rule 4-1.3, Comment [3]. In this case, Respondent failed to take action to advance his client's case past the introductory filing and rather than complete the objectives of the representation, Respondent dismissed the case without the authority of his client.

Compounding Respondent's violations of Rule 4-1.3 is Respondent's inaction following the dismissal of Mr. Gossett's malpractice case. Respondent took no action on the matter for the six months following its dismissal. Respondent did not hire an expert

and Respondent did not refile the case. Instead, Respondent told Mr. Gossett that he was "conflicted out" of representing him and told Mr. Gossett that he would find him a new attorney. Thereafter, Respondent took no action to find Mr. Gossett an attorney, choosing instead to provide Mr. Gossett the names of two area attorneys and asking Mr. Gossett to contact the attorneys on his own. Once Mr. Gossett filed his complaint with the OCDC and the statute of limitations was coming dangerously close to running, Respondent agreed to represent Mr. Gossett in his action, though none of the exigent circumstances had changed. In filing the second petition just days before the statute of limitations ran, Respondent violated Rule 4-1.3 by causing needless delay.

Respondent's inaction in the case of Mr. Gossett closely parallels another Missouri attorney who was suspended after failing to file a client petition until five days before the running of the statute of limitations, failing to respond to opposing counsel's summary judgment motion and taking no action on the client case following the dismissal. *In re Crews*, 159 S.W.3d 355 (Mo. banc 2005). In *Crews*, this Court found that Respondent's repeated neglect in his client's case was a violation of Rule 4-1.3 and warranted a suspension. An attorney in West Virginia was also suspended after delaying in filing a client petition for seven months and then doing nothing on the case after it was dismissed for inactivity. *Lawyer Disciplinary Bd. v. Beveridge*, 459 S.E.2d 542 (W.V. 1995). Like the attorneys in *Crews* and *Beveridge*, Respondent filed a client action, neglected pursuit of the case and then compounded the problems by neglecting the case following dismissal. As such, Respondent is guilty of violating Rules 4-1.3 and 4-3.2.

ARGUMENT

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO ADEQUATELY COMMUNICATE WITH HIS CLIENTS IN VIOLATION OF RULE 4-1.4 IN THAT RESPONDENT ROUTINELY REFUSED TO TAKE OR RETURN TELEPHONE CALLS FROM CLIENTS AND FAILED TO KEEP HIS CLIENTS REASONABLY INFORMED ABOUT THE STATUS OF THEIR LEGAL MATTERS.

Rule 4-1.4(a)(1) states that a lawyer shall keep the client reasonably informed about the status of the matter. Keeping a client informed entails informing the client of court dates, motions and pleadings filed on their behalf, dismissals, and changes in the lawyer's contact information, as well as providing copies of documents and responding to client telephone calls and letters. ABA/BNA Lawyers Manual on Professional Conduct, *Lawyer Client Relationship* § 31:501 (2005). "Reasonable communication between the client and the lawyer is necessary for the client effectively to participate in the representation." Rule 4-1.4, Comment [1].

In the case of Respondent, there is a consistent pattern in each of the five complaints before the Court in that Respondent engaged in one or more acts of misconduct, thereafter cut off communication with his clients or otherwise failed to respond to their attempts to contact Respondent, tried to conceal or correct his misconduct only *after* the OCDC received a complaint, and when unable to otherwise

conceal or correct his misconduct, Respondent placed the blame for the misconduct on his absentee secretary.

In the case of Larry Mackey, Respondent's telephone logs indicate that Mr. Mackey called and left messages for Respondent on 15 occasions during a four week period. Respondent admits that he had access to his telephone logs, yet Mr. Mackey testifies that Respondent did not return any of the 15 telephone calls. Regina Foster, Sara Foster and Bonnie Rash give similar accounts of repeatedly calling Respondent, leaving messages for Respondent and not receiving a return call. Sara Foster even scheduled an appointment with Respondent because she was concerned about the lack of progress on her case, but Respondent failed to attend the meeting or give Ms. Foster notice that he was not going to be present. Each of the complainants states that he or she was left not knowing what was taking place in the litigation and at least two of the complainants began following the progress of their cases on the internet because Respondent was not providing them any information as to what was happening in court.

Perhaps Respondent's most egregious violation of Rule 4-1.4 occurred in the case of Charles Gossett, where Respondent dismissed the malpractice action of Charles Gossett without obtaining Mr. Gossett's consent or telling Mr. Gossett that the case had been dismissed, after-the-fact. Respondent testified at hearing that he believed the decision to dismiss was his (and not his client's) to make. Rule 4-1.2 requiring an attorney to abide by the client's decisions, makes clear that Respondent is mistaken. However, it was at least incumbent on Respondent to communicate with Mr. Gossett about the possibility of dismissing the case and confirming the dismissal with Mr. Gossett

after it occurred. In one Ohio matter, the Ohio Supreme Court found that an attorney who voluntarily dismissed a case without the client's consent was guilty of failing to keep the client informed about the status of the matter. *Cleveland Metro. Bar Assn. v. Sherman*, 929 N.E.2d 1061, 1063 (Oh. 2010). The Supreme Court of Louisiana made a similar finding in the matter of *Sims*, where an attorney filed a motion to dismiss his clients' insurance case without their knowledge and failed to advise his clients that he had dismissed their case. *In re Sims*, 994 So.2d 1280, 1282 (La. 2008). The Louisiana Court found that the attorney had violated the Rules of Professional Conduct requiring an attorney to appropriately communicate with his or her client. *Id.* In the present matter, Respondent exacerbated his mistake in dismissing Mr. Gossett's malpractice action by failing to communicate with Mr. Gossett for six months following the dismissal. Mr. Gossett repeatedly attempted to reach Respondent, but learned that his matter had been dismissed on the internet. Though Mr. Gossett attempted to communicate with Respondent, like the other complainants in this matter, Mr. Gossett was unsuccessful.

ARGUMENT

III.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO SAFEKEEP THE FUNDS OF HIS CLIENT AND THIRD PARTY MEDICAL PROVIDERS IN VIOLATION OF RULE 4-1.15(i) IN THAT UPON RECEIVING FUNDS BELONGING TO HIS CLIENT AND OTHER THIRD PARTY MEDICAL PROVIDERS, RESPONDENT FAILED TO PROMPTLY NOTIFY THE PARTIES OF THE RECEIPT OR DELIVER THE FUNDS TO THE APPROPRIATE RECIPIENT.

Rule 4-1.15(i) provides:

> Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as provided by this Rule 4-1.15 or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

The mandates of Rule 1.15 are strict and failure to abide by their terms is cause for discipline. *In the Matter of St. Onge*, 958 A.2d 143, 144 (R.I. 2008).

As discussed, *supra*, this Court previously held that an attorney who came into possession of settlement funds belonging to a client and third party and who subsequently failed to promptly notify the parties of the funds or promptly deliver the settlement funds, was in violation of Rule 4-1.15. See *In re Ehler*, 319 S.W.3d 442 (Mo. banc 2010). Similarly, the Court of Appeals of Maryland has noted its history of holding that an attorney who fails to notify a lender of the attorney's receipt of a settlement check and does not pay a client's debts from settlement funds violates Rule 1.15. *Attorney Grievance v. Zuckerman*, 872 A.2d 693, 710 (Md. 2005).

The facts supporting a finding that Respondent violated Rule 4-1.15 are undisputed. Respondent acknowledges that he withheld money from Regina Foster's settlement funds for the payment of third party medical liens. Respondent further admits that he did not notify any of the lien holders by letter that the settlement money had been received. Respondent vaguely recalls telephoning one of the lien holders with notice of receipt of the funds. Respondent admits that he did not pay those lien holders until 11 months after receipt of the settlement funds. Finally, Respondent admits that Regina Foster did not receive the excess funds that she was owed until 11 months after the receipt of the settlement funds. During the time period in which Respondent held the $2,200 in liens, the money was kept in a non-interest bearing IOLTA account. And though Respondent had notice of the amounts that were due almost one year earlier, Respondent did not pay the liens until Regina Foster filed a complaint with the OCDC. Respondent's inaction constitutes a clear violation of Rule 4-1.15(i).

ARGUMENT

IV.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT KNOWINGLY FAILED TO RESPOND TO LAWFUL DEMANDS FOR INFORMATION FROM THE OFFICE OF CHIEF DISCIPLINARY COUNSEL DURING THE COURSE OF TWO DISCIPLINARY INVESTIGATIONS IN VIOLATION OF RULE 4-8.1(c).

Rule 4-8.1(c) provides that a lawyer in connection with a disciplinary matter shall not knowingly fail to respond to lawful demands for information from disciplinary authorities. "The requirement to cooperate in disciplinary investigations is rooted in the self-governing nature of the legal profession." *Lake County Bar Assoc. v. Vala*, 693 N.E.2d 1083, 1084 (Ohio 1998). Each lawyer has a duty to participate in the regulation of the profession, even if the investigation is focused on the attorney, himself. *Id.* A lawyer's failure to cooperate in a disciplinary investigation can greatly hamper the efforts of disciplinary authorities and evidences the lawyer's lack of regard for the seriousness of the proceeding. *In re Cutting*, 671 N.W.2d 173, 175 (Minn. 2003) (quoting *In re Engel*, 538 N.W.2d 906, 907 (Minn. 1995)).

On or about April 14, 2010, the OCDC provided Respondent a copy of Larry Mackey's complaint and requested that Respondent provide a written response no later than April 28, 2010. Respondent did not provide a response to Larry Mackey's complaint. On May 14, 2010, the OCDC contacted Respondent again and again

requested a written response to Larry Mackey's complaint. Respondent failed to provide a response to the complaint. On May 27, 2010, the OCDC contacted Respondent and informed Respondent that the OCDC would require Respondent's response, but there was no response forthcoming. Providing Respondent one last opportunity to comply, the OCDC contacted Respondent by letter on July 20, 2010 and demanded the Respondent respond to the complaint or be subject to a subpoena for appearance in Jefferson City, Missouri. The OCDC received no response from Respondent and was thereafter forced to issue a subpoena for Respondent's appearance in Jefferson City.

Similarly, on June 16, 2010, the OCDC notified Respondent by letter that it had received a complaint against Respondent from Bonnie Rash and requested that Respondent provide a response to the complaint no later than June 30, 2010. The OCDC did not receive a response from Respondent and contacted him again on July 6, 2010, requesting a response to the Rash complaint. Again, Respondent did not provide a response. Finally, on July 20, 2010, the OCDC requested a response to the Rash complaint from Respondent. In July, 2010, approximately two to three weeks before Ms. Rash's divorce trial, Respondent told Ms. Rash that if she did not withdraw her complaint from the OCDC, Respondent would terminate the attorney-client relationship. Thereafter, the OCDC received Ms. Rash's request to withdraw her complaint and a brief response from Respondent followed.

This Court has stated that "[w]e depend on our bar committees to investigate allegations of unethical conduct. . [.] and "[w]e expect members of the bar to cooperate promptly and candidly with bar committees." *In re Donaho*, 98 S.W.3d 871, 874 (Mo.

banc 2003). This Court has further stated that repetitive non-cooperation with disciplinary counsel justifies the conclusion that an attorney does not fully understand the profound duty imposed by his profession. *In re Staab*, 719 S.W.2d 780, 784 (Mo. banc 1986). Though it was incumbent on Respondent to provide the OCDC his responses on the OCDC's first request, Respondent was given four or five opportunities to respond to the complaints discussed above. In each instance, Respondent failed to provide a response to the complaints. It is clear from Respondent's repeated failure to respond to requests from the OCDC and repeated violation of Rule 4-8.1(c) that Respondent does not comprehend the magnitude of his professional obligations.

ARGUMENT

V.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO MAKE REASONABLE EFFORTS TO ENSURE THAT HIS NON-LAWYER ASSISTANT'S CONDUCT WAS COMPATIBLE WITH RESPONDENT'S PROFESSIONAL OBLIGATIONS IN VIOLATION OF RULE 4-5.3(b) IN THAT RESPONDENT ASSERTS THAT HIS SECRETARY FAILED TO GIVE HIM TELEPHONE MESSAGES AND CASE DOCUMENTS CAUSING RESPONDENT DELAY IN FORWARDING CLIENT AND THIRD PARTY FUNDS AND RESPONDING TO CLIENTS AND DISCIPLINARY AUTHORITIES.

Rule 4-5.3(b) provides that when a nonlawyer is employed by a lawyer and the lawyer has direct supervisory authority, the lawyer must make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. The importance of such a rule was articulated by the Maryland courts who said, "[a]n attorney may not escape responsibility to his clients by blithely saying that any shortcomings are solely the fault of his employee." *Attorney Griev. Comm'n v. Goldberg*, 441 A.2d 338, 341 (Md. 1982).

Respondent testified that from July, 2009, to April, 2010, Ms. Sherry Simpson was employed as Respondent's secretary. Respondent contends that Ms. Simpson began missing work in August, 2009, approximately two months after she was hired, yet Ms. Simpson continued to work with Respondent for eight to nine more months. Although there may be some question within the constructs of the ethics rules as to what constitutes a reasonable effort to ensure proper conduct by nonlawyer employees, at a minimum the lawyer must screen, instruct, and supervise nonlawyer employees. *Matter of Struthers*, 877 P.2d 789, 792 (Az. 1994) citing *In re Galbasini*, 786 P.2d 971, 975 (1990). If Respondent contends that Ms. Simpson's absences were indicative of her shortcomings as a secretary, then Respondent must also acknowledge that he had early notice of the same shortcomings and failed to take any corrective action.

Respondent also contends that Ms. Simpson failed to give him incoming mail and that following her departure, Respondent found stacks of correspondence at Ms. Simpson's desk. Respondent's testimony would indicate that Respondent failed to take notice of his secretary's work station, which was located in his office, or supervise Ms. Simpson's handling of the mail. Similarly, Respondent contends that he advised Ms. Simpson to prepare checks to Regina Foster's lien holders so that he could sign and mail the checks to creditors. Respondent concedes, however, that he did not immediately follow-up with Ms. Simpson to ensure that the checks had been prepared. Because Respondent knew, himself, that he had not signed the checks and because Ms. Simpson did not have signatory authority on the checks, Respondent did have knowledge that the checks had not been prepared, but again took no corrective action.

Where a non-attorney staff member told a Maryland attorney's client that the client did not have to attend his own criminal trial, thereafter resulting in the client's two day incarceration, the attorney was found to have violated the rules requiring supervision of nonlawyer employees. *Attorney Griev. Comm'n v. Mooney*, 753 A.2d 17 (Ct. App. Md. 2000). In the case of *Cater*, an attorney was suspended for failing to supervise a secretary who embezzled almost $50,000 from two estates for which the attorney was the court-appointed guardian and conservator. *In re Cater*, 887 A.2d 1 (Dist. Columbia Ct. App. 2005). In both the *Mooney* and *Cater* cases, it is arguable that the attorneys in question had less knowledge of their employees' activities than Respondent had of Ms. Simpson's activities. Still, it was appropriate for Cater and Mooney to be disciplined for failing to supervise staff. Respondent cannot attempt to place the blame for his misconduct on the shoulders of Ms. Simpson and thereafter escape culpability for failing to supervise her actions. As such, by Respondent's own admissions and testimony, Respondent is guilty of having violated Rule 4-5.3(b).

ARGUMENT

VI.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT ENGAGED IN CONDUCT THAT WAS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE IN VIOLATION OF RULE 4-8.4(d) IN THAT RESPONDENT DRAFTED AND ENTERED INTO A CLIENT CONTRACT THAT PURPORTED TO PROHIBIT HIS CLIENT'S COOPERATION WITH A DISCIPLINARY INVESTIGATION.

Rule 4-8.4(d) provides that it is professional misconduct for an attorney to engage in conduct that is prejudicial to the administration of justice. Conduct that is prejudicial to the administration of justice is conduct that may interfere or bring harm to the procedural functioning of a proceeding or to the substantive interests of the parties. *In re Conduct of Paulson*, 216 P.3d 859, 865 (Or. 2009). In the case of *Miller*, where a respondent verbally demanded that an another attorney withdraw the disciplinary complaint filed against her, the Iowa Supreme Court held that the attorney attempted to interfere in the disciplinary process in violation of the rules of ethics. *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Miller*, 568 N.W.2d 665, 667 (Ia. 1997) citing *Committee on Prof'l Ethics & Conduct v. McCullough*, 468 N.W.2d 458, 462 (Iowa 1991).

In the present action, Respondent contacted Mr. Mackey and scheduled a meeting at Respondent's office, where Respondent presented Mr. Mackey three checks totaling

$900.00 in refund of the trust deposit and attorney's fees paid to Respondent by Mr. Mackey. Prior to this meeting, Mr. Mackey had never discussed with Respondent the possibility of settling a claim against Respondent, but when presented with a settlement contract for signature, Mr. Mackey understood that his receipt of the $900.00 refund was contingent on his signing the settlement agreement. Included in the settlement contract drafted by Respondent was a provision stating that Larry Mackey must agree not to maintain, prosecute or assist in any prosecution of complaints made against Respondent with the Missouri Bar. Respondent drafted this provision knowing that Larry Mackey had already filed a complaint with OCDC.

Though Respondent maintains that it was not his intention to prohibit Mr. Mackey from assisting in the OCDC's disciplinary investigation, Respondent's assertion is belied by the letter that Respondent drafted to the OCDC. Respondent drafted a letter, dated July 9, 2010, directed to Dori DeCook, paralegal at the OCDC, with Larry Mackey's name in the signature block. The July 9, 2010 letter drafted by Respondent stated, "Dear Ms. DeCook: I wish to withdraw my complaint, File No. 10-530. Mr. Swischer and I have resolved all issues in my complaint and I am satisfied with his representation. Sincerely, Larry W. Mackey." The OCDC withdrawal letter was presented to Larry Mackey by Respondent for his signature. Prior to arriving at Respondent's office on July 9, 2010, Larry Mackey had never told Respondent that he wanted to withdraw his complaint from the OCDC, but, again, Larry Mackey understood that receipt of his refund was conditioned on signing the letter.

That Respondent intended to prevent Mr. Mackey's participation in a disciplinary investigation is also supported by Respondent's conduct in the other complaints. Bonnie Rash testified that two to three weeks before her trial, Respondent informed her that he would terminate his representation if Bonnie did not withdraw her complaint from OCDC. After receiving a copy of Sara Foster's complaint to the OCDC, Respondent contacted Ms. Foster to persuade her to withdraw her complaint with the OCDC. The Supreme Court of Iowa has held that the duty to report ethical violations implies a duty by the subject attorney not to frustrate that process, and an attempt to interfere in the grievance process is a basis for discipline. *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Miller*, 568 N.W.2d 665, 667 (Ia. 1997) citing *Committee on Prof'l Ethics & Conduct v. McCullough*, 468 N.W.2d 458, 462 (Iowa 1991). In the present action, Respondent clearly intended to interfere with the disciplinary process and as such, Respondent is guilty of violating Rule 4-8.4(d).

ARGUMENT

VII.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO REDUCE HIS CONTINGENCY FEE CONTRACT TO WRITING IN VIOLATION OF RULE 4-1.5(c).

Rule 4-1.5(c) requires that a contingent fee agreement be reduced to writing and signed by the client. Written contingency agreements reduce misunderstanding between the parties. *Baker v. Whitaker*, 887 S.W.2d 664, 669 (Mo. App. W.D. 1994).

Respondent and Mr. Gossett entered into a verbal contingency agreement whereby Respondent was to receive 30-35% of any recovery. Mr. Gossett testifies that he does not recall signing a contingency fee agreement at the inception of the representation. Further, having searched his own records and those of his father's firm, Respondent can produce no written contingency fee agreement. In December, 2010, after Mr. Gossett filed a complaint with the OCDC, Respondent asked Mr. Gossett to execute a written contingency agreement and Mr. Gossett testifies that this is the only employment contract that Mr. Gossett ever signed. As such, the evidence demonstrates that Respondent failed to reduce his original contingency fee agreement to writing in violation of Rule 4-1.5(c).

ARGUMENT

VIII.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO REAPPLY FOR A PERIOD OF TWO YEARS BECAUSE SUSPENSION IS APPROPRIATE WHEN AN ATTORNEY:

a. KNOWINGLY FAILS TO PROVIDE SERVICES TO A CLIENT OR ENGAGES IN A PATTERN OF NEGLECT BY FAILING TO COMMUNICATE OR DILIGENTLY PURSUE A CLIENT MATTER;

b. CAUSES AN ADVERSE OR POTENTIALLY ADVERSE EFFECT ON A LEGAL PROCEEDING;

c. KNOWS OR SHOULD KNOW THAT HE IS DEALING IMPROPERLY WITH CLIENT OR THIRD PARTY FUNDS; AND

d. KNOWINGLY ENGAGES IN CONDUCT THAT IS A VIOLATION OF A DUTY OWED TO THE PROFESSION.

When considering the level of discipline to impose for violation of the Rules of Professional Conduct, this Court has considered the propriety of the sanctions under the American Bar Association model rules for attorney discipline ("ABA Standards"). *In re Crews*, 159 S.W.3d 355, 360 (Mo. banc 2005). Under Section II, The Theoretical

Framework, the Standards state that each court imposing sanctions must answer four questions: First, what ethical duty did the lawyer violate? Was it a duty to the client, the public, the legal system or the profession? The Standards assume that the most important ethical duties are those obligations which an attorney owes the client. *See* Standards for Imposing Lawyer Sanctions, American Bar Association, 1991. Next, a court must determine the attorney's mental state. Did the attorney act intentionally, knowingly, or negligently? *Id*. Third, a court must ascertain the extent of the actual or potential injury caused by the lawyer's misconduct. Was there a serious or potentially serious injury? *Id.* And, finally, a court must determine whether there are aggravating or mitigating circumstances. *Id*.

The Theoretical Framework of the ABA Standards also provides that when an attorney violates multiple Rules of Professional Responsibility, as is charged in the case of Respondent, the ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct and often should be greater than the sanctions for the most serious misconduct. Standards for Imposing Lawyer Sanctions, American Bar Association, 1991. In light of the ABA Standards' position that the sanction should be consistent with the most serious violations charged, the recommendation for sanction will focus on the most egregious instances of misconduct as set forth above.

a. Knowingly Fails to Provide Services to a Client or Engages in a Pattern of Neglect by Failing to Communicate or Diligently Pursue a Client Matter

American Bar Association Standard 4.4 provides that suspension should be imposed when a lawyer knows that he is not performing the services requested by the client and causes injury or potential injury-or when an attorney engages in a pattern of neglect with injury or potential injury to the client. In the case of Larry Mackey, Respondent failed to attend the Meeting of Creditors, failed to conduct a 2004 Examination and failed to file a timely adversary complaint, demonstrating a harmful pattern of neglect. Respondent's violation of duty was to his client, which is the most serious in nature. Knowing that Respondent had missed important deadlines, Respondent never asked the court to accept the filings out of time, nor did Respondent attempt to remedy the situation with respect to his client. In fact, Respondent never even informed Mr. Mackey that the deadline for filing an adversary complaint had passed. The only reason that Respondent had for failing to tell Mr. Mackey of his error was one of self-preservation and self-interest. Respondent did not want to face the consequences of his actions and so he determined not to inform his client of his misconduct.

While Respondent admits that he failed to appear at the Meeting of Creditors and failed to conduct a 2004 Examination, Respondent contends that neither the Meeting of Creditors nor the 2004 Examination were required to support an adversary complaint and therefore suggests that Mr. Mackey was not harmed by Respondent's conduct. Respondent neglects to recognize that his failure to perform agreed upon services, in and

of itself, is harmful to the client and diminishes the esteem of the legal profession in the eyes of the public. Respondent took fees to appear at the Meeting of Creditors and the 2004 Examination, but then, after-the-fact, suggests that his failures did not matter because those things were not necessary in order to perform a different agreed-upon duty (the filing of an adversary complaint). Similarly, Respondent suggests that because Timothy Bruce's bankruptcy was ultimately dismissed, therefore allowing Mr. Mackey to collect on his judgment, there was no element of harm. The ABA Standards, however, treat potential harm the same as actual harm and in the case of Mr. Mackey, the potential harm was substantial. Just as Timothy Bruce's bankruptcy was dismissed, it could just have easily been discharged, leaving Mr. Mackey with no available means to collect his judgment. In the case of *Donaho*, a Missouri attorney was suspended for a period of one year after moving without informing his client, failing to file her claim, failing to return the advanced fee and then misrepresenting to the OCDC that the fee had been returned. *In re Donaho*, 98 S.W.3d 871 (Mo. 2003). *Donaho* would indicate that where a client matter is neglected to such extreme as to eliminate or potentially eliminate a client's cause of action, suspension is the appropriate sanction.

Respondent has also demonstrated a pattern of neglect with respect to the representation of Sara Foster, Regina Foster, Bonnie Rash and Charles Gossett. In the case of Sara Foster, Respondent assumed representation of Ms. Foster, but did nothing to advance her adoption proceeding for 10 months. During that time period, Sara Foster's husband did not have rights to her children as a legal parent. Further, the anxiety created by Respondent's neglect is evident in Ms. Foster's account of having repeatedly called

Respondent, scheduling an appointment that Respondent missed and then having to file a complaint with the OCDC. Respondent's pattern of neglect brought actual harm upon his client.

In the case of Regina Foster, Respondent's failure to pay the medical liens for which he withheld settlement funds and failure to distribute money to his client and third party medical providers was knowing in that Respondent continued to receive statements and bills from Ms. Foster's medical providers indicating that the liens had not been paid. Further, Respondent's secretary did not have signature authority on his checks and Respondent knew that he had not signed the checks, making him aware that the checks had not been sent. Ms. Foster's bills indicated that on one account, she continued to earn penalties, creating actual harm for Respondent's client. Respondent's inaction also created actual harm to his client and the third party medical providers in that they did not have access to their money for almost 11 months and during that time, the money was held in a non-interest bearing IOLTA account. Finally, the potential harm was serious in that Ms. Foster's creditors could have turned her over to collections at any time. This Court found that where a Missouri attorney failed to calculate and disburse settlement funds, failed to respond to requests for information and failed to maintain her client trust account to maintain settlement fund amounts, disbarment was the appropriate remedy. *In re Ehler*, 319 S.W.3d 442 (Mo. banc 2010). Like *Ehler*, Respondent took possession of settlement funds and failed to disburse those funds to third party medical providers, as well as his client, indicating that a severe sanction is warranted. Unlike *Ehler*, however,

there is no evidence that Respondent allowed the settlement funds to deplete in his account, making suspension, as opposed to disbarment, the indicated sanction.

Of the most concern was Respondent's failure to obtain Mr. Gossett's permission to dismiss the malpractice action or inform Mr. Gossett that the action had been dismissed. Respondent's actions severely impacted Mr. Gossett's case in that Mr. Gossett was required to refile his malpractice case within one year of the dismissal or potentially lose his right of action. In dismissing Mr. Gossett's action without his permission and then failing to inform Mr. Gossett of the dismissal, Respondent knowingly failed to represent his client. Prior to the OCDC's involvement, Respondent had taken no action to refile Mr. Gossett's malpractice case, though the statute of limitations was coming perilously close to passing. Again, Respondent's conduct was knowing in that he purposely attempted to pass Mr. Gossett's case to another attorney. The potential harm to Mr. Gossett is certainly obvious in that there appears the distinct possibility that his case would not have been refiled had he not filed his complaint with the OCDC. This Court found in *Crews* that a lengthy suspension was appropriate where an attorney had failed to respond to a motion for summary judgment, allowed his clients' case to be dismissed and then took no action following the dismissal of the case. *In re Crews*, 159 S.W.3d 355 (Mo. 2005). In a case such as this, where Respondent's lack of diligence and failure to communicate extends to five sets of clients and borders on disbarrable, a two year suspension is appropriate and warranted.

b. Causes an Adverse or Potentially Adverse Effect on a Legal Proceeding

Respondent was charged with engaging in conduct that is prejudicial to the administration of justice in that he drafted and entered into a settlement agreement that purported to prohibit his client from participating in an investigation by OCDC. That Respondent drafted the language is not at issue, as Respondent admits that he drafted the contract. That Respondent's conduct was intentional should not be at issue, as Respondent has demonstrated a consistent pattern of coercing, and in the case of Bonnie Rash, threatening, in order to persuade his clients to withdraw their complaints from the OCDC. The ABA Standards provide that absent aggravating or mitigating circumstances, disbarment is appropriate when the attorney has the intent to interfere and causes serious or potentially serious adverse effects on the proceeding. In this case, Complainant, Mr. Mackey agreed to mail a letter to the OCDC requesting the withdrawal of his complaint, as did Bonnie Rash. It is entirely possible that both of these individuals, who did appear and testify at hearing, may have decided that they were not going to participate, severely hampering the efforts of disciplinary authorities. The adverse effect is tantamount to witness tampering and is significant in that it demonstrates Respondent's selfish motive and reckless disregard for the nature of disciplinary system. However, this Court has stated that disbarment is reserved for situations where an attorney is not fit to continue in the practice of the law. *In re Crews*, 159 S.W.3d 355 (Mo. banc 2005). While Respondent's conduct certainly calls into question his fitness to practice, the Disciplinary Hearing Panel's recommendation that Respondent be suspended for a period of two years appears to be the more appropriate sanction.

c. Knows or Should Know that he is Dealing Improperly with Client or Third Party Funds

ABA Standard 4.12 provides that suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. The Commentary to Standard 4.12 also provides that "[s]uspension should be reserved for lawyers who engage in misconduct that does not amount to misappropriation or conversion. The most common cases involve lawyers who commingle client funds with their own, *or fail to remit client funds promptly*." (emphasis added). In the case of Regina Foster, Respondent knew that he had withheld over $2000 to pay lien holders. Respondent knew that any money left from the liens belonged to Regina Foster. Respondent knew that that the payments to the lien holders had not been made. Respondent contends that he asked his secretary on more than one occasion to issue the checks, yet Respondent never picked up the check book and wrote the checks, himself. As a result, neither the lien holders nor Regina Foster received their portion of the settlement money until 11 months after it was issued by the insurance company. Respondent's knowing conduct was a violation of his duties to his client and to the public.

The injury to Ms. Foster and to the third party medical providers is apparent. Both experienced substantial delay in the receipt of their settlement money. In the case of *Keller*, the Supreme Court of Louisiana took note of their history of cases wherein attorneys were suspended for failing to remit client funds, even when there was no dishonest or selfish motive. *In re Keller*, 998 So.2d 40, 46 (La. 2008) citing *In re*

Michael Wayne Kelly and Evelyn C. Kelly, 857 So.2d 451 (La. 2003); *In re Dobbins*, 805 So.2d 133 (La. 2002); and *In re Jones*, 721 So.2d 850 (La. 1998). The fact that Ms. Foster and her lien holders were deprived of their money is sufficient to warrant a suspension, even when Respondent did not intend to convert their funds.

d. Knowingly Engages in Conduct that is a Violation of a Duty Owed to the Profession

Respondent admits in his Answer to having violated the Rules requiring Respondent to comply with lawful requests for information from the OCDC. ABA Standard 7.1 provides that disbarment is appropriate when a lawyer knowingly engages in conduct that is a violation of his duty to the profession with intent to obtain a benefit for himself and causes serious or potentially serious injury to the legal system. Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to the legal system. The legal profession is self-regulated and we rely on the integrity of attorneys to abide the Rules of Professional Conduct and treat disciplinary agencies with respect by responding to requests for information. If each licensed attorney was left to decide for himself when and if he would like to respond to disciplinary authorities, the system wholly fails.

Because Respondent failed to respond to the OCDC's multiple requests for response, the OCDC was forced to expend time, effort and money in issuing a subpoena to secure Respondent's appearance in Jefferson City. It is for this reason that violations of Rule 4-8.1 are treated as egregious conduct. Noting one attorney's failure to cooperate

with disciplinary authorities, the Supreme Court of Minnesota has stated that "an attorney's failure to cooperate with an investigation can lead to indefinite suspension from the practice of law." *In re Disciplinary Action Against Cowan*, 540 N.W.2d 825, 827 (Minn. 1995) citing *In re Sigler*, 512 N.W.2d 899 (Minn. 1994); *In re Neill*, 486 N.W.2d 150 (Minn. 1992); *In re Gillen*, 452 N.W.2d 647 (Minn. 1990). Respondent's repeated history of failing to respond to the OCDC's requests combined with Respondent's multitude of other offenses makes suspension an appropriate sanction.

Aggravating and Mitigating Circumstances

The ABA Standards provide that once misconduct is established, it is appropriate to evaluate the aggravating and mitigating circumstances. In the case at bar, aggravating factors include Respondent's dishonest or selfish motive, pattern of misconduct, multiple offenses, bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency, refusal to acknowledge the wrongful nature of his conduct, and vulnerability of the victims. Mitigating factors include Respondent's absence of a prior disciplinary record and personal or emotional problems.

In Respondent's Answer to the Information, Respondent admitted to many of the allegations charged, which, upon first blush, would indicate that Respondent was willing to take responsibility for his actions and cooperate with disciplinary authorities. However, Respondent's actions were undercut by the contradictory testimony provided at hearing and in depositions, as well as Respondent's subsequent attempts to blame the majority of his misconduct on his secretary, even when the dates and times at issue did

not make it reasonable to do so. Respondent's failure to respond to disciplinary complaints and attempt to place blame for his actions on the shoulders of his former secretary indicate that Respondent did not take responsibility for his actions and was not cooperative with disciplinary authorities.

Also an aggravating circumstance was Respondent's selfish motive, indicated by Respondent's attempts to correct his misconduct only *after* the involvement of the OCDC. Larry Mackey received his refund only after he filed a complaint; Respondent took action on Sara Foster's adoption and called the GAL only after the OCDC became involved; Respondent paid Regina Foster's lien holders after she filed her complaint with the OCDC; and Respondent refiled Charles Gossett's action, which had been dismissed without Mr. Gossett's permission, only after Mr. Gossett filed a complaint. Respondent's selfish motive can further be illustrated in Respondent's attempts to persuade, coerce or threaten his clients to dismiss their complaints at OCDC. Even during the investigation of Respondent's misconduct, Respondent was concerned only with his own welfare.

In mitigation of Respondent's multiple violations and pattern of misconduct is Respondent's lack of a disciplinary history and relative inexperience in the practice of law. Respondent further provided testimony that the condition of his daughter, who suffers from Aspberger's Syndrome, contributed to his inability to focus on his client duties.

In several of the violations alleged, the ABA Standards would indicate that disbarment is appropriate. In the majority of the violations at issue, the ABA Standards

indicate that suspension is the appropriate sanction. While the multitude of aggravating weigh against affording Respondent any leniency for the personal problems that he asserted, the overall analysis would suggest that an actual suspension is the appropriate sanction in this case. Because it would appear that Respondent needs a substantial amount of time to reevaluate his practice and familiarize himself with the ethical standards by which he must adhere, Informant would assert that suspension of Respondent with no reinstatement for a period of at least two years is an appropriate and warranted sanction.

CONCLUSION

For the reasons set forth above, the Chief Disciplinary Counsel respectfully requests this Court:

(a) find that Respondent violated Rules 4-1.3, 4-1.4(a)(1), 4-1.5(c), 4-1.15(i), 4-3.2, 4-5.3(b), 4-8.1(c), and 4-8.4(d);

(b) suspend Respondent's license to practice law; and

(c) tax all costs in this matter to Respondent, including the $1000.00 fee for suspension, pursuant to Rule 5.19(h).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 2012, a true and correct copy of the foregoing was served on Respondent's counsel via the electronic filing system pursuant to Rule 103.08:

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CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 19,050 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Trend Micro software was used to scan the document for viruses and that it is virus free.

Shannon L. Briesacher

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